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by

A. R. DOUBLET, F.C.I.I.

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PREFACE

In writing this book I have tried to make it as interesting as possible by referring to practical examples and by including historical information where I have thought it would help the student to understand the reasons leading up to present-day practice.

My thanks are due to the ladies who typed the script, to many of my colleagues who have helped me in one way or another, and, in particular, to Dr. W. A. Dinsdale, Ph.D., B. Com., Mr. H. Hutchinson, F.C.I.L.A., and Mr. W. A. Jackson, F.C.I.I., F.I.A.S., who have given up much of their precious time to reading through the script and making valuable and constructive suggestions. I am indeed grateful to them all.

A.R.D.

CONTENTS

TABLE OF CASES

LAW REPORTS

A LAW report is a published account of a legal proceeding and gives a statement of the facts, the arguments on both sides and the reasons the court gave for its judgment. The reports are identified by the names of the parties, the year, the reporting authority, and the volume and page where the report can be found.

Regular law reporting appears to have started about the time of Henry VIII. It was carried on by a succession of private reporters in the various courts until 1865, and many of the cases reported before that date incorporate an abbreviation which indicates the name(s) of the reporter(s) concerned, e.g. Camp. refers to Campbell's reports; Taunt. to Taunton's reports; Exch. to Welsby, Hurlstone and Gordon's reports.

In 1865 there commenced the semi-official "Law Reports" published by the Incorporated Council of Law Reporting. These reports are still being published and, for the purposes of fire insurance cases, are identified by the letters Q.B.D. (or K.B.D.), i.e. Queen's (or King's) Bench Division. This abbreviation also includes cases brought before the Court of Appeal. In Scotland, the relative abbreviation is Ct. of Sess., i.e. Court of Session. A.C. (or App. Cas.) refers only to cases brought before the House of Lords or Privy Council. The Incorporated Council of Law Reporting also publishes a weekly series known as the Weekly Law Reports (W.L.R.) and in addition there are various privately owned series of which the most important is the All England Law Reports (All E.R.).

In some cases the year is shown in a round bracket and in others in a square bracket. Briefly, the reason is that a square bracket is only used where the date is an indispensable part of the reference to the case.

CHAPTER 1

INTRODUCTORY

THE claims section of the fire department is undoubtedly one of the most important, for it is here that the terms and conditions of the insurers' policies have to be interpreted in the light of claims made thereunder. The majority of such claims are straightforward and need only the application of routine measures, but rarely a day goes by, particularly in the larger offices, without some problem, often difficult, having to be resolved, e.g. questionable liability, an unreasonable amount claimed, or legal complications. In short, although it could be said that it is comparatively easy to discuss with a policyholder a hypothetical claim and what *might* happen in given circumstances, the adjustment of an actual claim in similar circumstances could be and often is fraught with many unforeseen difficulties. The fact that, with very few exceptions indeed, claims are settled so amicably is a just tribute both to the insurers themselves and to those in charge of the claims sections of fire departments.

It is obvious, therefore, that anyone dealing with claims made under policies issued in the fire department should have a sound basic knowledge of the following—

1. The terms and conditions of all such policies concerned, comprising mainly—

   (*a*) fire policies for trade and for private house;

   (*b*) comprehensive policies, in so far as they apply to risks written in the fire department; and

   (*c*) consequential loss policies.[1]

(There are others of lesser importance which will be considered in later chapters).

2. The terms and conditions of the various extensions (including special or extra perils) available to, and the restrictions placed on, such policies.

3. Acts, statutes and legal features with a direct bearing on the adjustment of claims, including rights of recovery against third parties.

4. The various methods of apportioning losses where the insurances on the property covered are shared, wholly or partly, by two or more insurers.

As a preliminary, however, it is helpful to understand the composition and day-to-day routine of the claims section and to have a working knowledge of the more important books and documents in use.

[1]Consequential loss policies are not dealt with in this book.

Composition, routine, and books will naturally differ considerably as between one company and another, but generally the section operates somewhat on the following lines.

THE CLAIMS SECTION

1. Composition

A small number of clerks with a senior official (often a "superintendent" at head office) in charge. The senior official is responsible for the efficient running of the section. He takes many decisions himself, but refers matters of principle or of particular difficulty to his departmental or branch manager.

The clerks all have their allotted tasks, of which the following are examples—

(*a*) preparation and maintenance of claim files;

(*b*) initial and subsequent completion of entries in claims' registers or on cards;

(*c*) instructions to cashier's department to draw cheques in settlement of adjusted claims;

(*d*) recovery of amounts due from reinsurers, and notification to reinsurers of serious losses in which they are interested;

(*e*) compilation and maintenance of various statistics.

(*d*) and (*e*) are normally centralized at the head office.

2. Routine, Including a Description of Books and Documents in Use

The best way to explain simply the day-to-day routine is to deal step by step with a claim from the time of notification until payment in settlement is made.

(*a*) On notification of the claim, two questions must have affirmative answers before any further step can be taken—

(i) Does the policy cover (as far as can be seen) the damage for which the claim is put forward?

(ii) If so, is the policy in force?

(*b*) On the assumption that both questions are answered satisfactorily, the claim is acknowledged, and if small (it is difficult to name a figure as the practice of insurers varies so much but, say, under £25) and no apparent difficulties arise, a form (known as a claim form)[1] is sent to the policyholder for completion and return. If the loss is known or expected to be large, adjusters (firms which specialize in the adjustment of claims) are normally instructed immediately and given full details of the insurance(s) as soon as possible thereafter. In serious losses and where immediate attention is essential the insurer gives the adjuster sufficient details of the cover in force to enable him to deal with the matter provisionally, and sends the complete information afterwards.

[1]See p. 6.

(*c*) A file is prepared, consisting usually of a backing sheet on which is written or typed a synopsis of the policy or policies concerned.

(*d*) The claim is given a reference number. This number serves as a means of permanent identification, and is often recorded on the office copy of the policy or in the policy papers.

(*e*) Certain information available at this time is entered in a register or on a card. Some offices use part of their claim files for this purpose. The information so recorded probably includes the following—

(i) Claim number and name and address of the insured.
(ii) Situation of the property damaged or destroyed.
(iii) Policy numbers.
(iv) Date and cause of damage.
(v) Estimated loss and recovery (if reinsured).
(vi) Details of reinsurances (if any).

There is also a space for insertion of the amount or amounts paid in settlement, including adjusters' fees and any other expenses, if incurred.

(*f*) If the estimated loss is sufficiently large, it is necessary to notify reinsurers (if any) whether interested facultatively or by treaty. This in either event is governed by the arrangements in force for such notifications, and are normally centralized at the head office.

For example, in *facultative reinsurance* (i.e. where each offer of reinsurance has been considered individually by the reinsurer before acceptance) it is customary to advise the reinsurer of any loss which is estimated to involve him in an amount of £150 or more. A simple form of preliminary advice is sent to each reinsurer concerned. The form gives, *inter alia*, the date of loss, name of insured, the ceding office's claim and policy number (for reference purposes), its estimated gross loss, and the reinsurer's proportion thereof.

In *treaty reinsurance* (i.e. an arrangement whereby the direct insurer agrees to cede, and the treaty reinsurer agrees automatically to accept, all reinsurances which fall within the limits of the treaty) the treaty agreement itself specifies the amount of loss of which the treaty reinsurers are to have notice. A typical extract from such an agreement may read: "Immediate notice shall be given by the insurer to the reinsurer of all losses of which the total amount to be borne by all reinsurers participating in the Treaty is estimated to exceed £1,000 (one thousand pounds). All other losses will be advised by quarterly lists." The form used to notify treaty reinsurers is based on that used for the notification to facultative reinsurers, but indicates the whole treaty proportion of the loss, e.g.—

Ceding Insurer's estimated Loss	£25,000
Treaty Proportion	9/10ths
Treaty estimated Loss	£22,500

A copy of such notification is sent to each treaty participant whose individual proportion is also shown, e.g. "Your Proportion $1\frac{1}{2}\%$."

(*g*) On the return of the completed claim form it may be possible to pay the amount claimed immediately. If, however, it is decided that further investigation is necessary, this can be done by correspondence, by sending a member of the staff to see the claimant, or by instructing adjusters if the form reveals any aspect which renders this course advisable. Whatever is done, the completed claim form must first be compared with the relative policy details to ensure that everything is in order, e.g. correct insured, situation of loss and property covered, and cause of loss or damage covered by policy. If a perusal of the form indicates that either contribution (i.e. there are other insurances effected by the insured on the same property) or subrogation (i.e. rights against third parties) applies, the appropriate steps must be taken. Both subrogation and contribution are dealt with fully in Chapters 6 and 8.

(*h*) On adjustment of the claim, a cheque in settlement is sent to the insured either direct or via brokers or agents. Adjusters' fees (if incurred) are paid at the same time. If *legal fees* are incurred as, for example, when problems of liability or recovery require special consideration, they are apportioned on the basis of amounts paid, or sums insured if no loss payment were made.

(*i*) In very large losses, the final adjustment of which may take some time, it is customary to make "payments on account" if so requested by the insured, who may have spent or be in need of money to replace stock, repair damaged buildings, or machinery. The adjusters usually recommend such a course if they are satisfied that it is warranted. Such payments are deducted from the finally agreed claim settlement.

(*j*) The entry in the register or on the card is completed. This normally includes the amount(s) paid and the proportionate amounts (if any) due from reinsurers. Amounts due from reinsurers, whether by treaty or facultative, are usually recovered quarterly, but most insurers agree special terms with their reinsurers whereby the former have the right to claim reimbursement (often termed "claiming cash") immediately the loss is adjusted if the total amount recoverable exceeds a pre-arranged figure. Simple forms are again used for these reinsurance recoveries. For *facultative reinsurance* the form refers to the date of the preliminary advice, repeats the ceding office's policy and claim numbers and date of loss, and in addition shows—

1. Gross payment made (by the ceding office).
2. Net loss (of the ceding company), i.e. after deduction of *all* reinsurances.
3. Cause of loss.
4. Reinsurer's proportion.
5. A request for early payment.

The form used for treaty reinsurance recoveries is similar in detail, but shows the total amount due from the treaty reinsurers and the individual share of each participant.

Losses, other than those for which immediate payment is requested, are aggregated and debited in the quarterly accounts for both types of reinsurance.

(*k*) The compilation and maintenance of statistics again depends on the practice of the insurers, but usually includes, *inter alia*—

(i) Cause of fire, e.g. cigarette, or oil stove.

(ii) Cause of other damage, e.g. storm, or impact.

These causes are sometimes referred to by a code number, e.g.—

Cause No. 7 (oil stove).
Cause No. 26 (storm).

(iii) Type of property damaged or destroyed, e.g. private house, cotton mill.[1] Here again, code (or classification) numbers are often used.

(iv) Amounts paid in settlement.[1]

3. Branch Powers

In the interests of economy and service to the public, the branch offices of most insurers have powers to deal with claims and to issue cheques in settlement therefor subject to some or all of the following arrangements—

(*a*) It is usual for head office to be advised immediately if the insurer's proportion of the estimated amount of any claim exceeds a certain figure, e.g. £500.

(*b*) Any claims involving possible litigation or substantial disagreement between insured and insurer may have to be referred to head office.

(*c*) Head office may decide to issue the cheque in settlement if the claim exceeds a certain figure.

4. End of Year Procedure

At the end of every year each insurer must know the total liabilities incurred in respect of claims notified and paid during that year because the relative figure has to be incorporated into the revenue account. The total amount consists of payments made where the claims are settled, and estimates where they are still outstanding when the year closes. Methods of arriving at these figures vary considerably, but the majority of insurers aggregate the figures month by month, so that the total gradually builds up during the year. Adjustments may have to be made

[1]On the assumption that premiums are similarly classified, the insurer can easily ascertain the experience of a particular type of risk by comparing losses paid with premiums received over the same period.

where the estimated figures for particular losses differ from the sums paid in final settlement. Amounts recovered, or estimated recoveries for outstanding cases, by way of reinsurance, are similarly totalled, so that the net amount can easily be ascertained by deducting the reinsurance recoveries made or estimated from the gross payments made or estimates provided.

Soon after the end of each year, treaty reinsurers have to be advised the total of the losses that they have incurred during the year *and which are still outstanding*, so far as they are concerned, when the year closes.

CLAIM FORMS

The majority of small losses are usually settled with little or no investigation, provided the insurer is in possession of all the necessary details of the loss. For this purpose, as already mentioned, each claimant is usually asked to supply the answers to various questions set out in a claim form. This form varies from office to office, but there are certain basic common features, and most forms require the following information—

1. Policy No.
2. Name and address of insured
3. Address at which the loss occurred
4. Date of occurrcnce
5. Cause of damage
6. Details of other insurances (if any) on the same property (to sec if contribution applies)
7. Particulars of the claim including—
   (*a*) Description of property damaged or destroyed
   (*b*) Cost price and date of purchase
   (*c*) Value at time of loss
   (*d*) Amount claimed (taking into account both depreciation and salvage)

If the claim is in respect of buildings, a builder's estimate must accompany the completed form.

Finally, the claimant has to sign and date a declaration to the effect that the property belongs to him and that no other person (except ....) has any interest in the property.

The information detailed above is self-explanatory, except (5) Cause of damagc. At present policies issued by the fire department cover many perils other than that of fire, and it is necessary, therefore, to use the word "damage," which embraces any insured peril. If damage arises from fire, it is usual to ask for the exact cause, e.g. paraffin stove ovcrturned, unextinguished cigarette, or fire in adjoining premises.[1]

[1]Scc Appendix A for a specimen claim form.

ACCEPTANCE FORMS

When a claim is investigated by an adjuster or other representative of the insurer, then as soon as a settlement has been reached the insured is usually asked to sign an acceptance form. This form usually reads as follows—

To the .... Insurance Co. Ltd.
Damage at ....
Policy No. ....

I/we hereby agree to accept, subject to your approval and in terms of the conditions of the above mentioned policy, the sum of £ in full satisfaction and discharge of all claims for loss or damage occasioned by or consequent upon the .... which occurred on the .... day of .... 19........ to property insured by the above mentioned policy. I/we declare that there are no insurances effected by me/us on the said property, or to my/our knowledge by any other party, except as above stated, and that the parties interested in the said property are as follows—

....

The salvage is to become the property of the ....*

Signature ....

Address ....

Date ....

Witnessed by ....

*This is completed by inserting either "the claimants" or "the insurers," according to the way in which the salvage is dealt with.

If the property is insured by more than one office, full details can be set out under the heading "Policy No." at the top of the form, e.g.—

Policy No. 1234 *with A.B.C. Insurance Co. Ltd.*
2345 *with D.E.F. Insurance Co. Ltd.*

The signing of the acceptance form by the insured is unconditional and, strictly, no addition to the claim can thereafter be made, although insurers generally do not take advantage of this in the event of a genuine oversight by the insured. The insurers, for their part, once they have approved the settlement must pay the amount stated, although in certain circumstances they may be able to recover part or the whole of the payment made.[1]

OTHER GENERAL FEATURES

Without Prejudice

If, for any reason, liability is doubtful, the insurer may elect to deal initially with the claim "without prejudice." By so doing, acceptance

[1]See Payment by Mistake, p. 48.

of liability is not admitted, and the insurer can consider the claim further when more information is available. Correspondence marked or any proceedings conducted "without prejudice" leave open any question of liability, and if the insurer subsequently decides to deny liability he is legally entitled to do so notwithstanding the investigations he may have instigated. Adjusters are sometimes instructed to deal with claims in this way. Where there are negotiations and terms are offered in settlement, documents may be marked "without prejudice," and cannot then be produced as evidence in Court without the consent of the party concerned.

Differences or Disputes

Although differences between insured and insurer occasionally arise, they are usually resolved amicably or, at the worst, resolved by some form of compromise before it becomes necessary to litigate.

Differences which do arise are mainly concerned with claims in respect of damage for which there appears to be no legal liability under the terms and conditions of the relative policy, or where, although the claim itself is legitimate, the insured is not satisfied with the settlement offered.

In claims for which there is, or appears to be, no liability, the insured must be so informed as soon as possible, and at the same time given the reason why his claim cannot be entertained. The information may be conveyed by letter, or in certain circumstances by a representative of the insurer or by an adjuster. If the insured refuses to accept the decision, further proceedings depend entirely on the circumstances of the claim. If legal proceedings should be taken by the insured, the case, if it comes to trial, is heard in open court.

If the difference is one of amount (or *quantum* as it is often called) the insured, by a policy condition, must agree to the matter being referred to arbitration.

Both Court and arbitration procedure are considered in Chapter 6.

Some differences may be resolved by *ex gratia* payments (see p. 49), particularly where there is an element of doubt.

ADJUSTERS AND ADJUSTERS' REPORTS

1. Description and Duties

Adjusters have for many years been employed by insurers. It is known that one firm of adjusters was active as long ago as the end of the eighteenth century and that in the next hundred years or so other firms were constituted. Originally called *assessors*, the fire loss adjusters in 1941 formed their own incorporated body with the title of "The Association of Fire Loss Adjusters." In 1962, the Association was granted a charter and the name changed to The Chartered Institute of

Loss Adjusters. This is a professional association, membership being controlled by regulations and examinations designed to assure the highest standards of competence and integrity. All applications are subject to scrutiny by the Institute Council for confirmation of the fulfilment of these requirements.

The basic duty of an adjuster, when instructed by the insurer, is to negotiate a settlement with the insured in respect of the loss or damage which constitutes the claim (always assuming that the claim is one for which the insurers are or appear to be liable); but merely to make such a simple statement would be unfair to the adjuster. As an adjuster's sphere of operations covers all claims for loss or damage to property, not only by fire but by many other perils, he must be able to interpret and apply all the various relative policy terms and conditions. But this is not all. In addition to being an insurance specialist he must be technically equipped to deal with building construction and costs (i.e. quantity surveying), have a knowledge of engineering, accountancy, trade processes, ruling commodity prices and the fine arts and, what is equally important, the ability to instil confidence into those with whom he negotiates, i.e. both insurer and insured. In *The Handbook of Adjustments of Loss or Damage by Fire for the use of Fire Underwriters* (J. Griswald), first published in the U.S.A. in 1877, a competent adjuster was described as "a combination of merchant, mechanic, underwriter, lawyer and detective." If the word "diplomat" had been included the description would be complete.

The advantages of employing adjusters are as follows—

(*a*) They are specialists in many fields.

(*b*) In dealing with a wide variety of claims they are able to build up a much larger store of information than could an individual insurer. Such information includes knowledge of—

(i) the best markets for disposal of salvage;
(ii) trends and tendencies in prices generally;
(iii) the steps which can often be taken to minimize loss or damage.

(*c*) Insured frequently prefer to deal with an independent intermediary rather than with an official of the insurer.

2. Claims Procedure and Reports

(*a*) On being instructed and given full particulars of the policy or policies concerned at the time or later,[1] if necessary, together with any other relevant information, e.g. name of person to contact (if other than insured), the adjuster proceeds as quickly as possible to the scene of the incident; having made investigations and established that—

(i) the claim falls within the scope of the cover;

[1] In case of urgency, e.g. instruction by telephone, it may only be possible to give brief details at the outset.

(ii) the claimant is the insured and had an insurable interest at the material time; and

(iii) the property damaged or destroyed is the property intended to be insured and is the subject-matter of the insurance

he arranges with the insured whatever he deems necessary according to the particular circumstances of the loss. Such arrangements may include the removal or protection of undamaged property, the carrying out of temporary repairs, asking the insured to get estimates for making good the damage, and giving general advice which may be advantageous to either or both the parties concerned.

(*b*) When he has completed his initial investigation, the adjuster sends to the insurer a preliminary report setting out briefly (in addition to policy and claim reference numbers and name of insured)—

(i) the date on which the loss occurred;

(ii) the situation at which the loss occurred, and the occupation at the time;

(iii) the cause of the loss, if known;

(iv) an estimate of the loss or damage, accompanied by any other information which may be of interest or use to the insurer.

If more than one insurer is concerned (i.e. where the property involved is independently so insured or where the business is shared by a number of insurers on a percentage or proportional basis) a copy of the preliminary report is sent to each insurer.

(*c*) The adjuster thereafter keeps in touch with the insured, from time to time reporting to or seeking instruction from the insurer, if necessary, until final settlement is reached. He then asks the insured to sign an acceptance form, and when this is received he sends it together with all supporting papers including, as a rule, a completed claim form, to the insurer under cover of a final report. The final report[1] is drawn up in detail and normally makes reference to some or all of the following—

(i) Name and address of insured, policy number(s), and claim reference. (This is a repetition of details given in the preliminary report).

(ii) Date and situation of loss.

(iii) Cause of loss. The cause is usually dealt with in detail and reference made to any information obtained or conclusions reached since the issue of the preliminary report. If the cause is unknown the adjuster probably confirms that in his opinion it is completely fortuitous so far as the insured is concerned. If the fire brigade attended, a report, which includes, *inter alia*, the fire officer's opinion of the cause, can be obtained from the relative authority at a small cost.

[1]See Appendix B for a specimen adjuster's report.

Sometimes details of the appliances that have been used and the work of the brigade are given to illustrate the severity and extent of the incident.

(iv) Description of damage. This is considered fully, reference being made to the particular building or buildings concerned (if more than one building is insured), and the relative item and plan numbers.

(v) Amount of claim and how constituted (e.g. buildings; machinery; stock) as put forward by the insured.

(vi) Adjustment of claim. This is dealt with item by item including, if available, some reference to the basis adopted by the insured in arriving at the figures submitted. If these figures are amended by the adjuster, he gives his reasons (e.g. claim overstated; depreciation not taken into account; allowance made for salvage) and then sets out the amount(s) finally agreed with the insured.

(vii) If the sum insured by any item of the insurance is subject to some form of average, the adjuster comments on the adequacy or otherwise of the sum insured and applies the particular condition, if necessary, thus reducing the agreed figure(s) mentioned in the preceding paragraph. He may, in any event, refer to the adequacy of the sum insured and draw attention to any underinsurance.

(viii) If any warranties apply, the adjuster confirms they have been observed. If the contrary applies, the attention of the insurer should have been drawn to the breach earlier on.

(ix) Papers supporting the claim (e.g. invoices, estimates) and the acceptance form are enclosed with the report which also show the adjuster's fees for settling the claim. Adjusters' fees are paid by insurers additionally to the agreed amounts of an insured's claim. Some claimants themselves instruct firms to negotiate claims on their behalf, but are then liable for any expenses incurred in so doing.

(x) Other features are—

(*a*) Salvage;

(*b*) Extinguishing expenses;

(*c*) Any rights against third parties, viz. parties who may be regarded as primarily responsible for the loss.

These are all dealt with in detail later.

3. Insurances Shared by Two or More Insurers

(*a*) If the insurances are shared by more than one insurer, the policies being independently arranged, different adjusters may be instructed. Each reports to his own principal, and the loss is apportioned among the insurers concerned. If one adjuster only acts for all insurers, he apportions the loss and sends a copy of his preliminary and interim (if any) reports to each insurer.

(*b*) If the business is shared on a percentage or proportional basis,

(ii) the claimant is the insured and had an insurable interest at the material time; and

(iii) the property damaged or destroyed is the property intended to be insured and is the subject-matter of the insurance

he arranges with the insured whatever he deems necessary according to the particular circumstances of the loss. Such arrangements may include the removal or protection of undamaged property, the carrying out of temporary repairs, asking the insured to get estimates for making good the damage, and giving general advice which may be advantageous to either or both the parties concerned.

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(i) the date on which the loss occurred;

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(*a*) If the insurances are shared by more than one insurer, the policies being independently arranged, different adjusters may be instructed. Each reports to his own principal, and the loss is apportioned among the insurers concerned. If one adjuster only acts for all insurers, he apportions the loss and sends a copy of his preliminary and interim (if any) reports to each insurer.

(*b*) If the business is shared on a percentage or proportional basis,

full particulars of the participating insurers, i.e. their names, addresses, proportions, and policy numbers or other references, are sent to the adjusters by the leading office, and each participant receives a copy of the preliminary and interim (if any) reports. In the final report the loss as adjusted is shared among the insurers concerned in proportion to their liabilities, and is shown in tabular form, each insurer receiving a copy of both report and apportionment. It is customary, in such circumstances, for the adjuster to submit for approval to the leading office a draft of his final report, suggesting at the same time a date for simultaneous payment of cheques by all the insurers concerned. The report finally distributed to the insurers refers to the fact that it has been approved by the leading office.

The following is an example of a simple apportionment—

Insurer	Policy No.	Proportion	Loss		Adjuster's fee		Total	
			£	s.	£	s.	£	s.
A B C	1234	50%	150	–	8	–	158	–
D E F	5678	30%	90	–	4	16	94	16
X Y Z	91011	20%	60	–	3	4	63	4
	Total	100%	300	–	16	–	316	–

(*c*) In order to avoid unnecessary expense or to save the insured the trouble of handling a large number of cheques, many offices have come to the following arrangements for insurances shared proportionately by a number of offices.

(i) If the total loss is estimated to be £250 or less, no question of liability arising, full preliminary and final reports are sent to the leading office only, each co-insurer receiving *synopsis reports* set out on the following lines—

PRELIMINARY REPORT

Name of insured — Cause
Situation — Item No.(s) affected
Date of fire or other damage — Estimated amount of Total Loss

In the absence of any reply we shall assume the following particulars are correct—

Insurer — *Policy No.* — *Proportion*

FINAL REPORT

Name of Insured
Class of Risk
Situation
Date of Fire — Cause — Item No.(s) affected
Amount of Insurance
Amount of Claim
Amount of Adjustment
(When more than one item is affected, the adjustment under each item should be shown)

Your Policy No. ....
Your Proportion.............................. Your Amount Payable £.......................
Adequacy or Inadequacy of Insurance..............................
Adjuster's Fee................................. Your Proportion £.................................
Cheque in settlement of your Proportion of the loss to be drawn in favour of .... posted on .... and sent to ....
A full report, synopsis and apportionment of this loss has been submitted to the leading Office .... and we are authorized by them to state that they approve same and the date of payment.

(ii) Where the settled amount of claim does not exceed £5,000, the leading office is authorized to pay in full both the agreed sum and the adjuster's fee, thereafter recovering from each co-insurer its proportion of the total outlay. Co-insurers receive full copies of all reports.

If the sum in settlement exceeds £1,000, each co-insurer is entitled to receive a full copy of the final report *before* payment is made by the leading office.

(*d*) If payment is made by the leading office on behalf of all insurers, the adjuster concludes his report accordingly and tells each co-insurer to send a cheque for its proportion of the loss and fee made payable to the leader. The same procedure is followed if a synopsis report only is used.

The final paragraph of an adjuster's report dealing with a claim for under £5,000 therefore reads somewhat as follows—

> We are authorized to advise you that a draft of this report and allocation have been submitted to and approved by the leading office, who will be paying the whole of the loss and our fee. It is therefore requested that cheques for the respective proportions as shown in the total column of the accompanying allocation be drawn to the order of .... and sent to them at their offices at .... by the evening post on ....

CHAPTER 2

GENERAL PRINCIPLES

In 1954 The Law Reform Committee were asked to consider the effect on the liability of insurance companies of special conditions and exceptions in insurance policies and of non-disclosure of facts by persons effecting such policies. At the time of writing no official action has been taken in respect of the Committee's recommendations set out in the fifth report (Conditions and Exceptions in Insurance Policies), 1957, Cmnd. 62, but the effect of such recommendations, although changing the present law, would not alter the practice generally adopted by insurers in the circumstances outlined. For this reason, it is unlikely that any official action will be taken. The comments and recommendations of the Committee will be considered with the principles and conditions to which they relate.

In their general summing up, before making their recommendations, the Committee said it was a fact that insurers, if they so wanted, *could* find technical defences to repudiate liability in certain circumstances, but concluded "were there evidence sufficient to justify the conclusion that insurers abuse their undoubtedly powerful legal position to any substantial extent the position might be different (i.e. the desirability or otherwise of certain legislation), but the evidence we have received falls far short of that."

THE IMPLIED CONDITIONS

The implied conditions are common law principles incorporated by implication into an insurance contract. As will be seen later, however, some of these principles are in fact referred to in the standard policy, mainly to make the position clear to the insured and thus to avoid the possibility of dispute through ignorance.

The implied conditions are—

1. The observance of the utmost good faith by both parties, i.e. insured and insurer.
2. The insured has an insurable interest in the subject-matter.
3. The subject-matter is in existence at inception, and
4. Can clearly be identified as the property it was intended should be covered.

1. Utmost Good Faith

Unlike ordinary commercial contracts where the doctrine of *good faith* only applies, an insurance contract requires observance of the

utmost good faith (*uberrima fides*), because the insurers have to rely entirely on information given them by the proposer. If, therefore, they are misled in any way, they may accept business that they would otherwise have refused, or may apply a lower rate or less onerous terms than they would have done had they been aware of the facts. The insurers may have entered into the contract solely because certain material information has not been given or has been incorrectly given by the insured, and if this proves to be so (the onus of proof being on the insurers) the insurers can avoid the contract.

The Law Reform Committee referred to utmost good faith in relation to non-disclosure. The Committee stated that the effect of non-disclosure is a consequence of the general law relating to insurance contracts and does not involve (of necessity) any express term or condition. They said it was well settled law—

> (*a*) that the duty of disclosure of material facts—or the rule of *uberrima fides*, as it is often called—applies to all classes of insurance; and
> (*b*) that the question in every case is whether the fact not disclosed was material to the risk, and not whether the insured, whether reasonably or otherwise, believed or understood it to be so.

The Committee used the definition of "material" adopted by the Privy Council in *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co. Ltd.*, [1925] A.C. 344, namely, that the fact, if disclosed, might have led a reasonable insurer to decline the risk or to stipulate for a higher premium, and added that the practical effect of the law on this point is that insurers are *entitled* to repudiate liability whenever they can show that a fact within the knowledge of the insured was not disclosed which, according to current insurance practice, would have affected their judgement of the risk.

It is true that, legally, the common law places a heavy burden on the proposer or insured, but it is equally true that insurers do not in practice take advantage of such "technical infringements" to defeat an honest claim. *Nevertheless, unless and until the law is changed the existing law still applies.*

The Law Reform Committee, in view of the foregoing, *recommended* that "For the purposes of any contract of insurance no fact should be deemed material unless it would have been considered material by a reasonable insured."

This recommendation, if carried into effect, could go further than is warranted, for it *would* be extremely difficult to determine what, in fact, is understood by the expression "a reasonable insured." Whatever interpretation *is* taken, nothing must be done to prevent an insurer dealing properly with proposers or insured who are guilty of fraudulent non-disclosure or the deliberate concealment of material facts. Such

persons have only themselves to blame and must therefore take the consequences of their actions.

The duty of utmost good faith also rests on the insurers who, for example, would be guilty of a breach in this respect if they allowed an insured to complete a contract knowing he had no insurable interest in the property covered.

This duty applies not only at the time the contract is negotiated but also attaches to each renewal of the policy *if* renewal constitutes a new contract. The position is also covered by certain policy conditions, e.g. those referring to non-disclosure, alteration, and removal, under which the subject will be considered further in the chapters on Standard Policy Conditions.

Both insured and insurer must observe good faith (not *utmost* good faith) in the event of a claim arising under the policy. The duty lies primarily on the insured who must, at all times, act with the same care as though he were uninsured. In the event of destruction or damage, therefore, he must take all reasonable steps to minimize the loss, arrange for extinguishment to be effected at the earliest possible opportunity (normally by summoning the fire brigade), safeguard movable property to the best of his ability, and generally help to lessen the insurer's loss. He must take no action which would in any way hinder the efforts of those seeking to extinguish the fire or helping in any other way to mitigate the damage.

The fact that he is covered by insurance must not be allowed in any way to influence an insured's behaviour. Any wilful action on his part, therefore, which could lead to the liability of the insurer being increased, might preclude him from recovering anything under his policy.

2. Insurable Interest

A contract of fire insurance sets out, within the terms, conditions and limits of the policy, to relieve an insured from any financial loss he may sustain by the destruction of or damage to any physical object in which he may be legally interested. To constitute insurable interest, therefore, the following three conditions must be fulfilled.

(*a*) There must be a physical object capable of damage or destruction by fire or other insured peril.

(*b*) This object must form the subject-matter of the insurance.

(*c*) The insured must bear some relation to such object *recogn*[illegible] *by law* whereby he stands to benefit by its safety or be prejudiced [illegible] destruction or damage.

It is the third requirement which is particularly important, and the validity or otherwise of the interest insured may well be decided on this condition.

An insured can only recover up to the amount of his interest in the

property covered, no matter for what sum he effects insurance. In other words, he can only look for an indemnity, i.e. be placed in the same position after the loss as he was before, subject always to the limitations imposed by the policy itself. As stated earlier, it is the insured's pecuniary interest that is protected, and insurance must do no more than give that measure of protection. As Lawrence, J., said in *Lucena* v. *Craufurd* (1806), 2 Bos. & P. (N.R.) 269, "Interest does not necessarily imply a right to the whole or a part of the thing"; and again "The property of a thing and the interest devisable from it may be very different."

Other features which concern insurable interest are—

(i) Mere Expectancy is Not Insurable

The common example is the heir to property who has no legal interest until such property passes to him by will or operation of law. But a legal *right* to future possession constitutes insurable interest.

(ii) Interest must Exist at Time of Loss

This is unquestionable. The case of *Sadlers' Co.* v. *Badcock* (1743), 2 Atk. 554, one of the earliest recorded cases dealing with fire insurance, dealt with this when it was held that "the party insured should have an interest in the property . . . when the fire happens."

At one time it was suggested that insurable interest must exist at the time the policy is taken out, but this suggestion is no longer held. For example, a merchant may be expecting a consignment of goods, but be uncertain of the date of their arrival. If he is responsible for insurance immediately on arrival he must for his own protection effect a policy at once and so be certain that cover will be operative when needed. If the goods are damaged or destroyed before arrival no liability will attach under the policy in spite of its existence, for no insurable interest, so far as regards the merchant, will exist at that time. If, however, an interest exists but later ceases, the policy at once ceases to apply and subsequent re-acquisition of the property or part thereof does not revive the contract.

(iii) How Insurable Interest Arises

Insurable interest can arise (1) voluntarily, or (2) be obligatory, e.g. statute or contract. The following are examples where insurable interest arises—

(*a*) Absolute owners.
(*b*) Mortgagors and mortgagees.
(*c*) Lessors and lessees.
(*d*) Vendors and purchasers.
(*e*) Trustees in bankruptcy.
(*f*) Trustee (guardian) for an infant.

(*g*) Trustees or executors of wills or estates.

(*h*) Bailees and contractors.

(*i*) Tenants, in certain circumstances where, in the event of damage to the property they occupy, they are deprived of their beneficial enjoyment of the property.

Examples where insurable interest is made obligatory by statute are as follows—

(*a*) *Ecclesiastical persons.* Incumbents must insure Church property against loss or damage by fire. (Ecclesiastical Dilapidations Measures, 1923).

(*b*) *Tenants for life and other limited owners* must insure against fire buildings erected or improved out of funds raised by means of charges on the settled land. (Improvement of Land Act, 1864; Limited Owners Residences Act, 1870; Settled Land Act, 1925).

(*c*) *Owners of small holdings* in certain circumstances must keep buildings insured against fire to the satisfaction of the local County Council (Small Holdings and Allotments Act, 1926).

A duty to insure may also be imposed by the terms of some contract either express, e.g. a covenant to insure by lessees or mortgagor, or implied, e.g. custom of trade. The extent of the interest depends on the terms of the contract. For example, a tenant or lessee may be obliged to insure the property for its full value.

(iv) The Extent of the Interest

The extent of an insured's interest depends on his legal relation to the property. Thus an owner is interested in the full value of the property and can insure accordingly although the property be mortgaged, whereas a mortgagee's interest is normally limited to the amount of the mortgage outstanding at the time of the loss unless it is made clear that he is insuring, not only for his own interest, but for other interests, i.e. the mortgagor, as well. In this event he can insure for and recover the full value, and hold any balance over his own interest in trust for the other interested party or parties.

(v) Persons Not Entitled to Insure

Such persons include the shareholder of a company (*Macaura* v. *Northern Assurance Co.*, [1925] A.C. 619), and a creditor for an ordinary debt, i.e. one not secured by a lien on specific property.

(vi) Persons Insuring on Behalf of Others

An agent may have authority to insure property on behalf of his principal or may insure without authority, provided it is made clear when effecting the insurance that it is made on behalf of another and that the insurance is subsequently ratified by the principal before loss.

It is possible for an insurance to cover property other than that of the insured or his agent acting for him. For example, an insured may cover the property of his visitors, servants, or other employees. In the event of loss, the insured holds in trust any moneys received for the benefit of those on whose behalf the insurance was effected (*Waters* v. *Monarch Life Assurance Co.* (1856), 5 E. & B. 870). There is, in the ordinary way, no insurable interest in the absence of negligence and the validity of such insurances depends on ratification by the owners of such property before loss. In practice, losses on property so insured are usually paid without ratification. If there is more specific insurance, the matter is one for negotiation between the respective insurers.[1]

(vii) LIFE ASSURANCE ACT, 1774

It has been suggested that the Act could be held to apply to fire insurance contracts inasmuch as certain provisions refer to the fact that the names of all interested parties must be inserted in the policy and that no sum greater than the insured's interest can be recovered. For a variety of reasons, however, it is unlikely that it was ever the intention that the Act should apply to anything other than life assurance, and today this is the generally accepted view. The Act was passed at a time when gambling was rife and policies were taken out on lives or events connected with politics, war, and even the social life of the day, irrespective of any insurable interest in the legal sense, and it was this practice that the authorities set out to stop.

3. Existence and Identity of the Subject-matter

The subject-matter of the insurance must exist when the contract is effected, and must be so described as to enable the insurer accurately to ascertain the nature of the risk he is undertaking, to define that risk in the policy, and to ensure the identity of the subject-matter in the event of loss. An insured must not be placed in the position where, for example, he can effect an insurance on one house under a description which could apply to two or even more houses, on the assumption that damage to or destruction of more than one house at any one time is extremely unlikely.

This is the reason why, if the subject-matter of the insurance cannot be identified by a name or a number of a road, e.g. "a cottage near Marshside Farm . . ." the insurance is made subject to an Identification Clause, which usually reads somewhat on the following lines—

> It is understood that the description given is sufficient to identify the property to be covered and that it is the only property so described in which the insured has an interest.

[1]See trust and extension apportionments—Chapter 9.

PROXIMATE CAUSE

The proximate or efficient cause of a loss is important for two reasons—

1. Most policies written in the fire department refer to the cover in two parts, viz.—

(*a*) *The insured perils*, i.e. those perils which, when operative, initially give rise to a claim under the policy.

(*b*) *The excepted perils*, i.e. those perils which, when operative, render such a claim invalid.

Where, therefore, the subject-matter of the insurance is actually damaged or destroyed by an insured peril, the insured can recover unless the insurer shows that the peril which caused the loss is excepted by the terms of the policy.

Thus the standard fire policy refers to property being "destroyed or damaged by fire not occasioned by . . . ."

2. Where the subject-matter is not actually damaged or destroyed by an insured peril but where, apart from the peril concerned, the loss could not have happened, that peril is, for the purposes of the policy, the cause of the loss. Thus damage to the subject-matter attributable to smoke arising from the fire, or caused by water used in extinguishment, is regarded as "fire" damage, fire being the immediate or proximate cause.

Sometimes, therefore, it becomes necessary to determine whether or not certain damage is legitimately covered by a policy, and in order to do so the proximate cause must be ascertained. No better definition of proximate cause has been given than that stated by Mr. Justice Lamb in *Pawsey* v. *Scottish Union & National Insurance Co.* (1908), *The Times*, 17th Oct., Appendix IV. He said proximate cause means—

(*a*) the active *efficient* cause
(*b*) that sets in motion a *train of events*
(*c*) which brings about a *result*
(*d*) without the intervention of *any force* started and working actively *from a new and independent source*.

The fact that many cases have had to go before the courts in order to decide what was the proximate or efficient cause that produced the particular damage is sufficient to illustrate the difficulties which may confront anyone trying to master this subject, but if the salient features of the definition given above are kept in mind and applied to any case under consideration, many apparent difficulties should disappear. As will have been realized from previous remarks, proximate cause, so far as the peril of fire covered under the standard fire policy is concerned, only arises when—

(*a*) the property is actually burned, but the effective cause is an excepted peril, and

(*b*) the property insured is not actually burned, but suffers other damage *as the result of a fire.*

The position can be expressed as follows—

Result	*Cause*	*Example*	*Remarks*
Insured property ignited.	Fire other than by excepted peril.	Spark from fire.	Insurer liable.
do.	Fire by excepted peril.	Fire caused by rioters.	Insurer not liable.
Insured property damaged but no actual ignition although fire present.	Fire other than by excepted peril.	Water used in extinguishment; smoke damage; damage caused by the fire brigade in the execution of their duties.	Insurer liable.
Insured property damaged but no actual ignition.	Excepted peril.	Explosion (concussion damage).	Insurer not liable.

As regards the last, the standard Fire policy expressly excludes damage by explosion whether caused by fire or otherwise (except in respect of boilers used for domestic purposes only, and, in a building not being part of any gas works, of gas used for domestic purposes or for lighting or heating the building). Thus, even if the property insured is damaged by explosion, itself proximately caused by fire, then although fire is the proximate cause the insurers are not liable for any explosion damage because of the exclusion. This was confirmed in the case of *Stanley* v. *Western Insurance Co.* (1868), L.R. 3 Exch. 71.

There is no liability on the part of the insurer although the property insured be actually burned if the resultant loss is a consequential one, e.g. increased expenditure due to the fire. The fire is then said to be the *remote* cause (*Re Wright and Pole* (1834), 1 A. & E. 621).

It is obvious, therefore, that the last cause need not necessarily be the proximate cause, but merely a link in the chain of events leading up to the actual damage. There must, however, be an efficient cause, followed by an unbroken sequence of events, one event leading naturally to another until a result, viz. the damage to the insured property, is achieved.

To determine, therefore, the proximate cause of the damage—

1. The probable effective cause of the damage must be ascertained.

2. If it can then be confirmed that that cause led naturally, either immediately or by a clearly unbroken chain of events, to the damage, then the ascertained original cause is the proximate cause.

3. If a new cause intervenes, it must be established that such cause is sufficiently strong to break the chain, i.e. to render the original cause ineffective. Unless this can be proved, the original cause will stand. As

was stated in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society*, [1918] A.C. 350—

> The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.

Although the possibility is remote, it could happen that both insured and excepted perils were operative at the same time. If this did occur, the following would apply—

(*a*) If the results of each cause could be clearly distinguished one from the other, damage resulting from the *insured* peril would be covered.

(*b*) If both causes operated *together* to produce the loss, the resulting damage would not be covered. The damage proximately caused by the excepted peril could not be distinguished from that caused by the insured peril, so all damage must be excluded.

A number of cases which have been before the courts are considered hereunder to show in each instance the reasons produced in order to decide the proximate cause. Some cases connected with other classes of business are included as they are examples of the principle.

Name and year of case	*Brief details of case*	*Decision and comments*
Johnston v. *West of Scotland Insurance Co.* (1828), 7 Shaw (Ct. of Sess.) 52.	Fire left gable wall of building in dangerous state. Local Authorities ordered demolition. Wall fell on and destroyed adjoining building (insured with *West of Scotland*). Defendants pleaded that fire only remote cause.	Proximate cause was fire—"Wall fell in consequence of injury it had sustained by the fire." Fire was proximate cause of that injury.
Gaskarth v. *Law Union* (July, 1876), Bunyan's *Law of Fire Insurance*, 7th ed., p. 163.	Fire left wall weakened but standing. Several days later blown down during violent gale destroying adjoining property (insured with *Law Union*). Defendants pleaded damage not due to fire.	Proximate cause was gale and negligence of owner of wall in not securing it to prevent it from falling.

(*Note*. These two cases may appear to be slightly contradictory. The feature to be kept in mind, however, is that whereas in the first the danger from the wall was *imminent all the time*, i.e. the fire continued to be an actively operating source of danger, in the second, the fire had spent itself and it required the intervention of a fresh impulse to produce the loss which otherwise might not have occurred.)

Ionides v. *Universal Marine Insurance Co.* (1863), 14 C.B. (N.S.) 259.	Ship lost her bearings in darkness—navigational light extinguished during war——wrong course steered—ship ran ashore. Policy ex-	Proximate cause was perils of seas, viz. bad navigation. Captain of ship knew coast was dangerous and that light

Name and year of case	*Brief details of case*	*Decision and comments*
	cluded war risks. Defendants pleaded war risks exclusion operated—said loss proximately caused by extinction of light.	had been extinguished—should therefore have stood by until daylight before continuing voyage.
Marsden v. *City & County Assurance Co.* (1865), L.R. 1 C.P. 232.	Serious fire during which a mob broke the windows of a nearby building and looted the contents. Policy excluded fire damage and defendants pleaded that fire was proximate cause.	Proximate cause was lawless violence of mob—fire held to be the remote cause of the damage.
Leyland Shipping Co. v. *Norwich Union Fire Insurance Society*, [1918] A.C. 350.	Ship torpedoed—reached harbour—salvage operations started—bad weather hampered salvage work—removal outside harbour ordered by harbour authorities in case ship sank and blocked fairway—ship moved but subsequently sank. Policy excluded war risks. Plaintiffs pleaded loss was due to ordinary sea perils.	Proximate cause was damage by torpedo—ship was lost because torpedo had so crippled her that she was unable to withstand what she could have withstood had she been a sound ship. Torpedoing preserved its efficiency throughout and was the actively operating cause which culminated in loss of the ship.
Tootal Broadhurst Lee Co. v. *London & Lancashire Fire Insurance Co.* (1908), *The Times*, 21st May, Appendix IV.	Earthquake caused fire which spread and involved many buildings some way distant from scene of original fire. Plaintiffs pleaded earthquake was remote cause as the fire it started was too far away to be regarded as proximate.	Proximate cause was earthquake, as fire had spread by natural causes e.g. by wind or by one thing catching fire from another and there was no intervening cause to break the chain.

This last case is often quoted when certain fire insurance principles are studied, because it covers many different features. So far as proximate cause is concerned, it was said there was no doubt but that the property had been destroyed by fire and the only question was whether the defendants, by the terms of the policy, were entitled to refuse to pay. If it could be established that the fire was what could be called an "earthquake fire," which spread to the plaintiffs' premises, admittedly some distance away, without the intervention of any cause except natural causes, then the ultimate damage must be regarded as coming within the exception, namely, fire caused by earthquake. The jury found that the fire was proximately set in operation by the earthquake and that the fire which destroyed the plaintiffs' property was one which had spread from the original place by an unbroken chain of causes. The exception therefore applied.

Another principle involved here is liability as the result of *spreading*

fires. In the case just referred to it was seen that an insurer is not liable if the proximate cause is an excepted peril, no matter how long the sequence of events, provided the spread is by natural causes. If, however, a new cause intervenes, the chain is broken and if the new cause is not an excepted peril, the insurer is liable. In the *Tootal* case the judge said that if someone had taken a burning brand from the place where the fire started and then walked into the plaintiffs' premises and set fire to them that *could not be an earthquake fire*.

ONUS OF PROOF OF LOSS.

Onus of proof is the expression used to describe the task or duty imposed on someone to produce evidence to prove that what he has stated or affirmed is true. For example, if A accuses B of stealing something from his shop the onus of proof that B did, in fact, steal something lies upon A, who may produce witnesses to give the necessary evidence.

In losses a similar principle applies. In the making of a claim on a fire policy the onus of proving that the loss was the direct result of fire lies on the insured. He need not prove the actual cause, i.e. how the fire started; it is sufficient if he produces evidence to show that the insured property was actually damaged or destroyed by fire; in other words, there is *prima facie* evidence of loss by fire. With this done, the onus of proof is discharged, so far as the insured is concerned, and it then passes to the insurers, if they so think, to prove that the loss falls within a policy exception.

If the insurers are able to discharge the onus of proof laid upon them (before the court, if necessary), the onus then shifts back to the insured to prove that for some particular reason the exception does not apply at all or only partly applies. If he is able to prove that a distinguishable part of the loss was not caused by an excepted peril, he has discharged the onus of proof to this extent, but if he fails to do so then the whole loss is regarded as falling within the exception.

Onus of proof can thus shift from one party to another according to the particular circumstances of the loss.

It is thought that the way in which the standard policy is worded alters the position as outlined above. Before its introduction in 1922, exceptions were usually set out in a policy condition or conditions and the onus of proof that an exception applied undoubtedly fell on the insurers. The exceptions (apart from explosion) are now incorporated into the preamble as a qualifying statement, the wording reading ". . . . destroyed or damaged by fire *not occasioned by* . . ." and it is thought that the onus now lies on the insured, not only to prove that the loss is caused by fire, but *in addition* is not caused by an excepted peril. So far, however, this has not come before the courts, so it is not known for certain if the original position has been affected by the

change.[1] As mentioned above, explosion is still dealt with in a policy condition, so the rules referred to earlier certainly apply to this peril.

PROPOSAL FORMS

A proposal form is a document which an insurer may ask a proposer to complete before deciding whether or not to accept the business. The form, in addition to having spaces for the proposer's name, address, occupation, situation of the property to be insured, and amounts placed thereon, lists various questions, the answers to which give the insurer some details of the physical hazard and information about the proposer's insurance history, e.g. previous losses, business, declinatures.

The proposal form has to be signed by the proposer, whether filled in by him personally or by someone acting on his behalf. The questions must be answered accurately, and if the answers are incorrect in any material particular the insurance can be avoided. The answering of such specific questions does not relieve the proposer from his duty to disclose all material facts.

If the proposal form contains a declaration whereby the proposer warrants the truth ("truth" being interpreted to mean "accuracy"—*Thomson* v. *Weems* (1884), 9 App. Cas. 671) of his answers, such proposal form and declaration being the basis of the contract, any inaccurate answer, whether material *or not*, gives the insurer the liberty to repudiate liability.

The Law Reform Committee therefore recommended that "notwithstanding anything contained or incorporated in a contract of insurance, no defence to a claim thereunder should be maintainable by reason of any misstatement of fact by the insured, where the insured can prove that the statement was true to the best of his knowledge and belief."

Notice that the onus of proof here would rest on the insured.

The position when a proposal form is filled up by an agent is dealt with under the heading of "Agents."

AGENTS

In the ordinary sense, an agent is one who is employed to do anything in the place of another. The person who employs him is called the principal. In law, however, the term "agent" has a more restricted meaning, and agency has been defined as "the result of a grant of power by the principal." From the insurance point of view, therefore, different types of agents can exist, according to the power granted by the insurer or principal, but the position is complicated by the fact that in certain circumstances the agent may become the agent of the proposer, e.g. where he completes a proposal form on behalf of the proposer.

[1]See "The Standard Policy and Conditions," by W. W. Otter-Barry, *Chartered Insurance Institute Journal,* Vol. 27, p. 57.

The rights and duties of an agent are usually set out in a letter of appointment, contained in a book of instructions, or implied from the general law of agency, but anyway his powers are usually defined. He must not exceed those powers, e.g. by giving cover outside the specified limits nor in the ordinary way can he delegate his authority. A broker comes in a different category. He is a recognized intermediary and can represent any company, unless directed otherwise, but as a general rule he has no power to give cover.

An agent must exercise diligence and skill according to his appointment, and must disclose anything he knows which may influence the principal in his acceptance of the risk. A broker is a professional intermediary and, therefore, has a much higher duty than the ordinary part-time agent.

In certain circumstances the liability of an insurer may be in doubt because of some action by its agent. He may have exceeded his authority in giving cover (although his principals may be estopped[1] from denying liability by their past actions), or may have been acting for the proposer at a particular time as the result of which material information may have been withheld from or given inaccurately to the insurer. The following law cases illustrate some of these features. Two cases deal with motor-car policies, but the principles apply equally to fire insurance.

Thornton-Smith *v.* Motor Union Insurance Co. Ltd.
(1913), 30 T.L.R. 139

The plaintiff had his car insured with a company which had declined to renew the policy. He then approached an agent of the defendants and completed a new proposal form; he omitted to answer the question relating to declinatures, but told the agent concerned that renewal had been declined by the previous insurer. Although the agent promised to pass on the information to his principals, he failed to do so, and it was held that the agent was acting as agent for the defendants, and that the plaintiff, having made the necessary disclosure, was entitled to recover in respect of a claim which arose.

Murfitt *v.* Royal Insurance Co. Ltd.
(1922), 38 T.L.R. 334

This case dealt with the insurance against fire risks of trees and fruit in an orchard. The plaintiff approached a local agent of the "Royal," who agreed to send a proposal to his principals and gave oral cover in the meantime. A fire occurred, but before news of the fire reached the defendants they declined the proposal and subsequently refused to meet the claim on the grounds that their agent had no authority to bind them by giving cover as he did.

It was held that although the agent concerned had no authority, express or otherwise, to make contracts of insurance, he must be held to have implied authority, for the evidence showed that it was impossible to carry on the business of fire insurance without giving oral cover. In addition, it was established that the agent had, in fact, been habitually giving cover for two years previously to the knowledge of, and with the consent of, his principals. On these grounds judgment was given for the plaintiff.

[1]See p. 29.

Newsholme Bros. *v.* Road Transport & General Insurance Co. Ltd. [1929] 2 K.B. 356

When a proposal for a motor vehicle policy was submitted the form, although signed by an authorized member of the firm, was completed by the agent. After an accident, the insurer repudiated liability on the ground of incorrect statements in the proposal form. It was found that although correct information had been given to the agent, for reasons unknown he had not put it in the proposal form. Judgment was given for the defendant. It was held that, in the particular circumstances, the agent was acting as agent for the proposer, and by signing the declaration in the proposal warranting the truth of the statements which were to form the basis of the contract, the proposer himself was responsible for any inaccuracy.

The Law Reform Committee commented on the employment of agents and the fact that in certain circumstances such intermediaries can be regarded as agents of the proposer. They suggested that "any person who solicits or negotiates a contract of insurance should be deemed, for the purposes of the formation of the contract, to be the agent of the insurers, and that the knowledge of such person should be deemed to be the knowledge of the insurers."

CHAPTER 3

THE STANDARD POLICY (I)

THERE is no doubt that the standard fire policy is by far the most important document handled by the fire department. It is applicable to all trade risks, and as its terms and conditions naturally form the basis for the submission and settlement of many claims, detailed knowledge of the form is essential. The standard form was adopted by the tariff offices in 1922, and is now almost universally used by companies, both tariff and non-tariff, carrying on fire insurance in this country. Based as it was upon practice over the preceding two hundred years, many of its terms and conditions follow legal decisions and have thus acquired precise interpretations. A knowledge of some of the more important law cases is therefore necessary to appreciate the reasons for present practice and to illustrate certain basic principles. With the foregoing in mind, the wording of the standard policy will now be considered in detail.

THE PREAMBLE AND THE OPERATIVE CLAUSE

In consideration of the insured named in the schedule[1] hereto paying to the .... (hereinafter called the Insurer) the first premium mentioned in the said schedule the Insurer agrees (subject to the Conditions contained herein or endorsed or otherwise expressed hereon which Conditions shall so far as the nature of them respectively will permit be deemed to be Conditions precedent to the right of the Insured to recover hereunder) that if after payment of the premium the Property insured described in the said Schedule or any part of such Property be destroyed or damaged by ....

The effect of the foregoing is twofold. First, all those conditions—*conditions precedent*—which can be so interpreted (and such conditions embrace not only those printed, but also those which may be incorporated by memoranda, i.e. "endorsed or otherwise expressed hereon") shall be construed as being "precedent to the right of the insured to recover hereunder" or, in other words, precedent to liability. The majority of the conditions, whether printed or otherwise, come under this heading.

These conditions are often classified into the following three groups—

1. *Conditions Precedent of the Contract.* These are conditions which, in the event of a breach, render the contract void *ab initio*, i.e. the contract has never attached. An example is non-disclosure or concealment

[1]The Schedule is that part of the policy in which are typed or written the insured's name, address, details of property covered, sum insured, premiums, period of insurance and renewal date.

of a material fact during the negotiations leading up to the issue of the policy.

2. *Conditions Subsequent of the Contract.* Such conditions in the event of a breach have the effect of avoiding the policy some time after it has come into force, i.e. the policy attached initially, but is subsequently avoided, e.g. removal or increase of risk without the insurer's approval.

3. *Conditions Precedent of Liability.* These are conditions the non-fulfilment of which bar the insured from recovering in respect of a particular claim, the policy otherwise remaining valid, e.g. notification of claim not being given within the prescribed time.

Although a breach of these conditions has a different effect according to the particular condition involved, the general effect is that, *in any event*, the insured cannot recover under the policy. In other words, all these conditions can be described as conditions precedent to recovery under the policy.

Stipulations. Not all policy conditions are construed as being precedent to liability. Some are *stipulations.* Stipulations do not go to the root of the contract, but are "collateral" to it. Thus, the refusal of an insured to allow the insurer to undertake subrogation rights against a third party would constitute a breach of this condition and would give the aggrieved party, viz. the insurer, a right to sue the other party, viz. the insured, for damages. Neither the validity of the policy nor the initial liability of the insurer is affected.

Waiver. Notwithstanding the breach of a condition as outlined above, an insurer, in writing, or by his conduct, or otherwise, may elect to treat the policy as being in force. Such action by him or by his authorized agent (acting within the terms of his authority) is termed a *waiver*, which has been defined as the waiving or forsaking of the assertion of exercising a right at the proper moment. In order that a waiver may be valid the insurer must be fully acquainted with all the facts relating to the breach.

An example of waiver is shown in the case of *Evans* v. *Employers' Mutual Insurance Association Ltd.*, [1936] 1 K.B. 505. A breach of a policy condition was discovered by an official of the company while investigating a claim, but despite this he arranged for the disposal of the salvage, itself an indication that the insurer was dealing with the claim. It was held that this action constituted a waiver of the breach.

Estoppel. An insurer may be what is called "estopped" by his conduct from insisting on the performance by the insured of a condition precedent. Estoppel is the term applied to an assertion or an admission recognized by law to be so binding that the party making it is not afterwards permitted to deny it by inconsistent statements or conduct. Estoppel has been defined as an impediment or bar arising out of one's own conduct whereby one is prohibited from averring or proving any-

thing in contradiction to what one has either expressly averred, or has by one's conduct led others to consider to be the case.

Payment of Premium. Second, the payment of premium is likewise such a condition precedent to liability and strictly, therefore, insurers are not responsible for any loss happening before such payment. As a general rule however, insurers assume liability before the issue of a policy in various ways, e.g.—

(*a*) by agreeing to give cover in one way or another, i.e. orally, in correspondence, or by the issue of a cover note;

(*b*) by their conduct, in which it is apparent that they consider themselves on cover;

and if thereafter they issue a policy in completion, they cannot then rely, at the time of a loss, on the non-payment of premium to avoid liability. Once the premium is paid and accepted, its effect is retrospective to inception, unless the policy states the contrary.

THE PERILS COVERED

1. *Fire* (whether resulting from explosion or otherwise) not occasioned by or happening through—
   (*a*) its own spontaneous fermentation or heating or its undergoing any process involving the application of heat;
   (*b*) Earthquake, Subterranean Fire, Riot, Civil Commotion, War, Invasion, Act of Foreign Enemy, Hostilities (whether War be declared or not), Civil War, Rebellion, Revolution, Insurrection or Military or Usurped Power;
2. *Lightning*;
3. *Explosion*, not occasioned by or happening through any of the perils specified in 1 (*b*) above
   (i) Of boilers used for domestic purposes only;
   (ii) In a building not being part of any Gas Works, of Gas used for domestic purposes or used for lighting or heating the building.

1. Fire

The word "fire" is used in its ordinary sense, and so far as a policy of insurance is concerned, implies the ignition of something that should not be on fire. In addition, the fire must be accidental or fortuitous in origin so far as the insured is concerned; thus a fire caused wilfully by a third party without the knowledge or consent of the insured is regarded as "accidental." The term does not include a fire confined to its proper limits, i.e. in a grate or stove, although once the fire spreads accidentally therefrom, by the medium of sparks or a piece of burning fuel, then anything ignited thereby is a loss by fire. An early case, *Austin* v. *Drew* (1815), 4 Camp. 360, deals with this. Sugar being refined was damaged by smoke and heat because an employee had failed to open a register, as a result of which excessive heat had been applied. The judge said ". . . there was no fire except in the stove and the flue . . . and the loss was occasioned by the confinement of heat. Had the

fire been brought *out of the flues* and anything been burnt, the company would have been liable . . . . This is not a fire within the meaning of the policy . . . ."

In addition, if property is accidentally burnt in an ordinary fire, i.e. property it was never intended should be burnt, such property is again a loss within the meaning of the policy. This was illustrated in the case of *Harris* v. *Poland*, [1941] 1 K.B. 462, where the judge said that provided the policy covers accidental damage caused by fire ". . . it matters not whether fire comes to the insured property or the insured property comes to the fire." So long as there is sufficient evidence that property *has* been damaged or destroyed in this way, insurers normally accept liability, but difficulty may arise if there is no evidence of any remains or there are no witnesses who can testify to the destruction of the property in the circumstances described. Each such case has to be treated on its merits.

Damage caused by smoke or by scorching from a fire burning within its proper limits is not regarded as fire damage within the meaning of the policy, since there is no ignition. Difficulties are sometimes experienced when claims for smoke damage in the circumstances are put forward for consideration, particularly with oil stoves which, because of inattention or improper attention, burn incorrectly and emit volumes of black sooty smoke. Nothing is on fire apart from the wick inside the stove, which admittedly is not burning properly, but nevertheless there is no "fire" as understood by a correct interpretation of the policy. Scorching may present difficulty as if the action of scorching (e.g. clothes airing in front of a fire) continues long enough ignition may finally ensue and many insurers admit liability for damage by scorching, albeit on an *ex gratia*[1] basis.

Chimney fires too are difficult. Flues and chimneys are intended to carry away certain products of combustion as smoke, which contains a quantity of soot. This soot, unless the flues are regularly swept, can accumulate and catch fire, with the result that intense heat is often generated, resulting in damage to the chimney pot and other parts of the flue.

Strictly, an insurer should be under no liability for making good any damage sustained as the result of chimney fires, because the "apparatus" involved is constructed to withstand the effect of heat. It has been argued, however, that the ignition of an accumulation of soot is something apart from the normal "usage" of the flue and insurers often meet claims so arising. It is regarded as "something (i.e. the soot) being on fire which ought not to be on fire." Penalties are imposed by Acts of Parliament where chimneys take fire, whether the chimney is fired wilfully (i.e. to get rid of the soot) or catches fire accidentally. It would

[1]See p. 49.

seem only right that an insurer should be relieved of liability for damage to property caused by the wilful firing of a chimney *by an insured*, although in practice it might not be easy to evade liability for damage so caused.

Damage caused by firemen or others during the course of extinguishing a chimney fire is covered by the policy.

Burning by acid or other chemicals (unless ignition ensues) is not regarded as fire within the meaning of the policy, neither is spontaneous fermentation or heating *without ignition*.

It has already been stated that fire damage to insured property is covered if caused accidentally so far as the insured is concerned. Even if the fire is caused by the negligence of the insured or his servants, the ensuing damage is still covered, although an insured could forfeit his rights if, for example, he prevented anyone from trying to put the fire out or to stop its spread. Damage to insured property by fire caused wilfully by any person other than the insured is covered, provided the insured is not a party to such act. Thus, damage following incendiarism is within the terms of the policy, and many losses from this cause are paid. Disgruntled employees frequently set fire to their employers' property, and, if apprehended, are liable to a prison sentence.

Such acts are covered by the Malicious Damage Act, 1861, which imposes various terms of imprisonment on any convicted person who, wilfully and maliciously, is responsible for the setting on fire of buildings and their contents and certain other property including, *inter alia*, stocks of various kinds or produce and growing crops.

The Act also applies to any person who wilfully sets fire to his own property with intent to defraud any other person, e.g. to obtain the policy moneys. In this event, an insured forfeits any right to recover under the policy.

The problem sometimes arises as to the relative positions of two or more named insured under a fire policy where a loss occurs through a criminal act, i.e. arson, by one of the insured. On the assumption that there was no connivance between the parties and that the interests were different, e.g. mortgagor and mortgagee, or lessor and lessee, it seems that the innocent party would not be prejudiced. There appears to be no law case dealing directly with this, but in *Westmacott* v. *Hanley* (1875), 22 Gr. Ch. U.C. 382, where the mortgagor wilfully burned the insured premises and the insurers voluntarily paid the loss to the mortgagees and took an assignment of the mortgage, it was held that they were entitled to enforce the whole debt against the mortgagor without giving credit for the sum paid to the mortgagees. In this case, therefore, the insurers saw no reason for not paying the mortgagees.

Apart from fire damage as such, any damage proximately caused by fire is also covered. Such damage includes that caused by—

(*a*) Smoke and heat, provided there is fire within the meaning of the policy.

(*b*) Water or other media used in extinguishment. "Other media" would include chemical extinguishers, foam, and the like.

(*c*) Firemen or other authorized persons (e.g. police) in the execution of their duties.

(*d*) Helpers endeavouring to check the fire by removing property to safety or by salvaging property, provided such actions are necessary and that reasonable measures are taken. In certain circumstances expenses of removal may be payable.

(*e*) Exposure to weather, provided there was no reasonable time in which to move the property to some form of shelter.

(*f*) The collapse of buildings or parts of buildings on to other property on the same or adjoining sites whether such other property is on fire or not.

(*g*) The blowing up or demolition by other means of property to prevent the spread of fire.

Theft of property removed for safety is also covered, although the theft must take place while the fire is in progress or soon after; otherwise, the *efficient cause* may not be construed as fire. It is assumed, too, that theft takes place during such time as the insured has no control over his goods. An element of good faith enters into this type of damage.

Although explosion is an excepted peril, damage caused by the explosion of substances not of themselves explosive is regarded as fire damage, the effect being usually to make the fire burn more fiercely. Tins or drums of paint often behave in this way when subjected to intense heat.

Many of the causes of damage referred to above were mentioned in the case of *Stanley* v. *Western Insurance Co.* (1868), L.R. 3 Exch. 71, when it was stated that—

> Any loss resulting from an apparently necessary and bona fide effort to put out a fire, whether it be by spoiling the goods by water or throwing the articles of furniture out of the window, or even the destroying of a neighbour's house—for the purposes of checking the progress of the flames, *in a word*, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy.

Whatever property is damaged or destroyed, fire being the proximate cause, compensation will be payable under the policy *which insures such property*, and which will not necessarily be the policy covering the property where the fire originated.

"*Whether resulting from explosion or otherwise.*" As will be seen later (when the policy conditions are considered), damage or destruction by explosion, apart from that of a "domestic" type, is specifically excluded. By the rule of proximate cause, therefore, all damage however

2 K.B. 583. In this case it was stated that, to constitute a riot, five elements must be present, viz.—

1. Not less than three persons assembled.
2. A common purpose.
3. Execution or inception of the common purpose.
4. An intent to help one another by force if necessary against any person who may oppose them in the execution of the common purpose.
5. Fear or violence displayed in such manner as to alarm at least one person of reasonable firmness and courage.

If, therefore, it is established that fire damage has been proximately caused by riot, such damage is excluded from the scope of the policy, although it is probably incorrect to assume that a riot is established *merely* because the five elements detailed above are present. It seems that there ought also to be some disturbance of the public peace.[1]

The case of *Glikstén* v. *State Assurance Co.* (1922), 10 Ll. L.R. 604, bears on this exception. The plaintiffs, owners of a large timber yard, had advertised for some timber porters and as a result a large crowd of unemployed congregated in the yard. On finding that only a few porters were wanted, those who had not been chosen created a disturbance and later in the day a fire broke out which lasted for several days, destroying a large quantity of timber. The policy conditions excluded destruction or damage by fire caused by riot, and the defendants declined to admit liability on the grounds that the disturbance caused by the unemployed constituted a riot and that this was the cause of the fire. The plaintiffs contended that the fire broke out some considerable time after the disturbance and that the two events, therefore, were not connected; they suggested that the cause of the fire was due to some electrical fault.

Although it was not disputed that the elements of a riot, as defined, were present at *some time*, it was held, and confirmed on appeal, that there was *no riot at the material time* and that the fire, therefore, had not been caused by incendiarism.

This case is also interesting because the insurance was led by the Royal Exchange Assurance, the State being one of many following offices. Each co-insurer had issued its own policy and the State policy was the only one in which the arbitration condition referred to disputes as to *amount* only. (This was before the introduction of the standard form of policy.) The plaintiffs, therefore, had the case dealt with in the courts, the State being named as defendants. All the insurers concerned had to abide by the decision reached.

being heated, is damaged or destroyed by a fire originating *in some other way*, the exclusion does not operate.

(*b*) [fire not occasioned by . . .] Earthquake, Subterranean Fire, Riot, Civil Commotion, War, Invasion, Act of Foreign Enemy, Hostilities (whether war be declared or not), Civil War, Rebellion, Insurrection or Military or Usurped Power.

These excepted fire perils are self-explanatory and call for little comment. All could cause catastrophic damage, and although, as will be seen later, some of these excepted perils can be included, their inclusion is subject to particular underwriting considerations involving the payment of additional premiums and the application of special conditions.

Earthquake

The exception of earthquake may seem strange, because the effects of an earthquake are usually associated with the collapse of buildings, and as the policy is a contract to cover loss or damage by *fire* the exclusion of earthquake damage may seem superfluous. An earthquake shock can, however, cause fires by overturning stoves, scattering the contents of fires in grates or breaking gas pipes, the escaping gas becoming ignited, and all such losses being proximately due to earthquake would therefore be excluded.

The case of *Tootal, Broadhurst Lee Co.* v. *London & Lancashire Fire Insurance Co.* (1908) (see p. 23) dealt with an earthquake fire (in Jamaica), and is important because it established the fact that where fire spreads naturally from an excepted peril all subsequent damage is proximately due to that peril.

Subterranean Fire

This can arise in two ways. First by the forces of Nature and secondly by the ignition of made-up ground where combustion may proceed very slowly many feet below the surface. The result of combustion in made-up ground often causes subsidence of buildings on the site and such fires are very difficult to extinguish.

It has never been established if the exclusion under the standard policy applies only to the first or to both forms of subterranean fire, and opinion differs accordingly. It is thought by some that as the exclusion has sometimes been joined with words such as "Volcanic eruption, earthquake or other convulsion of nature," this tends to show that the exclusion is aimed at a fire occasioned by the forces of Nature and not otherwise. However, the matter is not without doubt.

Riot

Riot was defined in *Field* v. *Receiver for Metropolitan Police*, [1907]

arising, proximately caused by explosion, is automatically outside the scope of cover afforded by the policy. Such, however, is not the intention of the insurers, who although wishing to exclude damage directly due to explosion want to include all fire damage (unless caused by certain other perils to be considered later) and they do this by inserting after "fire" the words "whether caused by explosion or otherwise," thus overriding the rule of proximate cause.

Explosion, as excluded by the policy, is given further consideration when dealing with policy Condition No. 3 in Chapter 5.

THE PERILS EXCEPTED
(from (1))

[fire] . . . not occasioned by or happening through—
(*a*) its own spontaneous combustion or heating
or
its undergoing any process involving the application of heat

The important words here are "its own," which are identified with a particular and self-contained unit. The most common example of such a unit, when considering spontaneous combustion, is the haystack. If the haystack is consumed by fire because of *its own* spontaneous combustion, no cover is afforded by the policy. If, however, the fire *spreads to any other units*, for example, nearby haystacks or farm buildings, destruction of or damage to such other units is covered. In the absence of the words "its own," all damage proximately caused by spontaneous combustion is excluded.

Certain commodities, such as vegetable fibres or those in which there is a high oil content (e.g. nuts of various kinds, some fish meals) are liable to generate heat if stacked under unfavourable conditions. As these conditions are generally known, steps should be taken to ensure, as far as possible, that the storage of such commodities is so arranged that self-heating is rendered unlikely. The fact that spontaneous combustion does sometimes arise usually indicates that the necessary but elementary precautions have not been taken and insurers are not willing to pay for subsequent damage to the unit in which the fire originates.

Similar considerations apply to the exclusion of damage to property itself undergoing any process involving the application of heat. Here again, the effect of subjecting property to heat should be known by the operator and, if the heat is applied too fiercely or too long, this would be indicative of bad management or poor supervision, for which the insurers should not be held liable (vide *Austin* v. *Drew* on p. 30). In other words, if the varnish in the pan catches fire and the fire spreads and damages surrounding property, insurers are liable for all damage apart from that caused to the pan and its contents. However, the damage must be occasioned by the heating process. If such property, even while

being heated, is damaged or destroyed by a fire originating *in some other way*, the exclusion does not operate.

> (*b*) [fire not occasioned by . . .] Earthquake, Subterranean Fire, Riot, Civil Commotion, War, Invasion, Act of Foreign Enemy, Hostilities (whether war be declared or not), Civil War, Rebellion, Insurrection or Military or Usurped Power.

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3. Execution or inception of the common purpose.
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5. Fear or violence displayed in such manner as to alarm at least one person of reasonable firmness and courage.

If, therefore, it is established that fire damage has been proximately caused by riot, such damage is excluded from the scope of the policy, although it is probably incorrect to assume that a riot is established *merely* because the five elements detailed above are present. It seems that there ought also to be some disturbance of the public peace.[1]

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Although it was not disputed that the elements of a riot, as defined, were present at *some time*, it was held, and confirmed on appeal, that there was *no riot at the material time* and that the fire, therefore, had not been caused by incendiarism.

This case is also interesting because the insurance was led by the Royal Exchange Assurance, the State being one of many following offices. Each co-insurer had issued its own policy and the State policy was the only one in which the arbitration condition referred to disputes as to *amount* only. (This was before the introduction of the standard form of policy.) The plaintiffs, therefore, had the case dealt with in the courts, the State being named as defendants. All the insurers concerned had to abide by the decision reached.

Civil Commotion

In *Langdale* v. *Mason* (1780), 2 Park's *Marine Insurance*, 8th ed., p. 965, an action arising out of a house destroyed by fire during the

[1]See also p. 195.

Gordon Riots, 1780, Lord Mansfield said "I think a civil commotion is this — an insurrection of the people for general purposes, although it may not amount to a rebellion, where there is usurped power." It was held that there was such an insurrection and the verdict was given for the insurers, represented by Mason.

War, Act of Foreign Enemy, Hostilities (Whether War be Declared or Not)

These are usually referred to as the "War Risks exclusions" and were introduced in their present form in 1937, when it was decided that such risks could not be dealt with by the insurance market. All the words or expressions indicate "a state or condition of Governments contending by force" and must be interpreted in that light. So far as this country is concerned, therefore, the words imply the existence of a state of war or hostilities with a foreign power.

Civil War

Civil war indicates acts of force intended to overthrow the existing Government or to frighten either of the Houses of Parliament into passing legislation against their will.

It has been suggested that civil commotion and civil war can be regarded as the comparative and superlative, respectively, of riot.

Rebellion, Insurrection or Military or Usurped Power

Each of these terms indicates a state of organized resistance against some established authority with the object of supplanting or overthrowing it.

Insurrection is something between civil commotion and rebellion. Military power includes acts done *against* those in open rebellion, and usurped power denotes an organized body unlawfully assuming some power of government.

As previously mentioned, the incorporation of the excepted perils into the preamble probably places upon the insured the onus of proving that the loss is—

(*a*) due to a peril covered by the policy, and if so requested by the insurers;

(*b*) is *not* due to an excepted peril.

Thus it may not be sufficient for the insured merely to prove that his property has been damaged by fire. He may also have to prove that an exception does not apply.

2. Lightning

The inclusion of lightning ensures that all damage so caused, whether fire breaks out or not, is covered. If this word were omitted, loss occasioned by lightning without ignition would not be covered.

3. Explosion

This is explosion not occasioned by or happening through any of the perils specified in 1 (*b*) above, (i.e. the "excepted perils")—

(i) of boilers used for domestic purposes only;

(ii) in a building not being part of any gas works, of gas used for domestic purposes or used for lighting or heating the building.

Explosion (apart from the limited cover given here) is considered in detail under Policy Condition No. 3, but it is apparent for many reasons that the extent to which damage by explosion is covered under the standard policy often seems to cause difficulty. This need not be so provided the following two features are kept in mind—

1. *Destruction or damage caused by explosion is not covered* (except as stated in the preamble).

2. In the preamble it is stated that destruction or damage caused by the *explosion of certain domestic appliances only is covered.*

Thus the only form of explosion damage covered centres round the word "domestic," which comes from the Latin "domus" meaning a house.

For what purposes would boilers or gas be used in a house? Both would be used to supply warmth (i.e. space heating), or hot water for washing purposes; and gas, although used mainly for cooking purposes, is still used in some parts of the country for lighting. Just as they do in their homes, so employees at their places of work need warmth, hot water for toilet purposes, cooked food (in canteens), and light to see what they are doing. In other words, these needs are of a domestic type, and damage by explosion arising from the use of boilers and gas solely to satisfy these needs is covered by the policy.

Gas is used in its everyday sense, i.e. coal gas (*Stanley* v. *Western Insurance Co.* (1868)), but would include the recently-introduced compressed gases, such as butane or Calor gas, if used for domestic purposes. The two limitations to this domestic gas explosion cover are that the explosion must be in a building, but not a building forming part of a gas works. Thus the policy does not extend to cover damage caused by an explosion of gas in a street, or damage to property caused by the explosion of gas in a gas works.

It is sometimes difficult to decide whether or not a boiler can be classed as "domestic", for although the word is used in the Boiler Explosions Act, 1882 (an Act dealing, *inter alia*, with investigations into

boiler explosions), it is not defined. Two cases, however, throw some light on the problem. In *Smith* v. *Müller*, [1894] 1 Q.B. 192, a boiler used for supplying hot water for cleaning and heating the office portion of business premises was held to be domestic and in *In re Willesden Corporation and Municipal Mutual Insurance Ltd.*, [1945] 1 All E.R. 444, a similar line was taken, the judge saying "if the purpose is one for which, according to the ordinary habits of domestic life, people require water in their homes, the purpose is a domestic one." It is the use made of the boiler, not the user thereof.

The limited explosion cover given and outlined above is itself subject to all the excepted perils detailed under "fire."

CHAPTER 4

THE STANDARD POLICY (II)

THE operative clause continues as follows—

> [If the property . . . be destroyed or damaged . . .] at any time before 4 o'clock in the afternoon of the last day of the period of insurance named in the said Schedule or of any subsequent period in respect of which the Insured shall have paid and the Insurer shall have accepted the premium required for the renewal of this Policy, the Insurer will pay to the Insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof.

This part of the operative clause covers several aspects: duration of first period, subsequent renewal periods, methods of indemnification and of calculating the loss, and reinstatement.

FIRST AND RENEWAL PERIODS

Duration of First Period

Once the policy has been issued, cover is operative from the first day named, although the policy is antedated, and continues to 4 p.m. on the last day specified. Many policies replace cover notes and their inception dates usually coincide; in other words, the policy incorporates the cover note. A loss under a cover note and within its terms and conditions is thus recoverable. As a general rule, cover notes are so worded as to incorporate the terms and conditions of the relative policy to be issued, but if the terms and conditions of the cover note differ from those of the policy, the insured is entitled to any additional cover afforded by the cover note notwithstanding the fact that the policy, when issued, may be more limited in scope.

Subsequent Renewal Periods

The insurer is under no obligation to offer or accept renewal, and may decline renewal if he so wishes. Similarly, the insured is under no obligation to seek renewal.[1] A renewal of the policy can be construed as tantamount to a new contract, as there must be offer and acceptance similar to that arranged at inception. This seems to be confirmed by the words ". . . the insured shall have paid and the insurer shall have accepted the premium required for the renewal of this policy," but nevertheless the view is also expressed that the renewal of a policy is a

[1] If, however, the policy is subject to a long-term agreement, there is an obligation on the part of both insured and insurer to continue the insurance for the period specified in the agreement.

continuing and not a new contract. On the probably correct assumption that each renewal constitutes a fresh contract, the duty of utmost good faith revives, and the insured must disclose any new material facts that have come into existence since the duty of disclosure last arose.

DAYS OF GRACE

Annual policyholders are allowed by custom (not by right) fifteen days, termed "days of grace," after the renewal date in which to pay the renewal premiums, and provided it is their intention to renew they are given protection during this period against damage caused by the perils covered. The concession is usually referred to in the renewal notice. This temporary protection is not available when—

(*a*) The insurer has declined to renew. (In this event it is advisable for the insured to be notified of the insurer's intention before the renewal date, in order that there may be no misunderstanding);

(*b*) The insured, in writing or orally, states that he is not renewing the policy;

(*c*) The insured refuses to renew the policy at the premium stated. In *Salvin* v. *James* (1805), 6 East. 571, the plaintiff endeavoured to claim for a loss within the days of grace in spite of his initial refusal to pay an increased premium. Judgment was given for the defendants because it was held they were not liable, since the insured's refusal to renew at the premium stated caused the policy to lapse.

(*d*) The insured, while not specifically refusing to renew, indicates in other ways his intention not to renew, e.g. by transferring the insurance to another insurer.

Days of grace are not necessarily withheld from a policyholder who seeks other quotations, but much depends on the circumstances. If quotations lower than the existing premiums were received, it might be *inferred* that the insured would not renew his existing policy, but this would not necessarily follow. Once, however, there is any intimation of non-renewal, the insured cannot thereafter in the event of loss insist that the insurer shall accept the renewal premium, although tendered within the days of grace.

If the insurer decides not to offer renewal, but by mistake accepts within the days of grace and without any reservation the premium when tendered, he is bound for the ensuing twelve months. If the protection of the days of grace is to be secured, the premium must be paid within the period named. Where, therefore, a claim is notified during the days of grace and the premium is not tendered until *after the expiry of the period concerned*, no liability attaches to the insurer (*Simpson* v. *Accidental Death Insurance Co.* (1857), 2 C.B. (N.S.) 257.

Once the days of grace have expired without receipt of the renewal premium, the policy lapses and nothing can bring it into force again.

If the renewal premium is tendered by the insured after the expiry of the days of grace and accepted by the insurer, the policy is revived from the date of payment, but the effect of revival is to constitute a new contract. If, therefore, a loss has occurred before such revival, no liability attaches to the insurers although the revival be antedated to the original expiry date *unless*, after being made aware of all the circumstances, they make it clear that they are prepared to meet the loss.

No days of grace are allowed for short-period policies.

FIRES IN PROGRESS

Although it rarely arises, it is possible for a fire to be in progress at the time of both commencement or expiry of the policy, and liability has to be considered. All such cases must be treated on their merits but the following basic rules are normally applied.

Commencement of Policy

If the loss is sustained before the policy commences, there is no liability although the fire may still be in progress; but if the fire started before such commencement and the loss is sustained thereafter, then liability attaches. The principle of good faith applies here, as non-disclosure by the insured of the existence of a fire at the time of seeking cover would be material.

Expiry of Policy

The rule here is similar in application to that for the commencement, inasmuch as the insurer is liable for any loss sustained up to expiry, or any loss sustained after expiry, if at the time of expiry it is clear that loss must inevitably result from the operation of a fire starting earlier. But there is no liability for a loss sustained after expiry although the fire which caused it starts during the currency of the policy.

The position here may be influenced by renewal, for if renewal has been offered by the insurer and accepted by the insured, any loss is covered in view of the days of grace.

INDEMNITY

Before the various methods of indemnification are studied, what constitutes an indemnity must be considered. The whole system of fire insurance is based on the principle of indemnity, by which the insurer undertakes, in the event of loss, to place the insured (by monetary payment or otherwise) in the same position as he was immediately before the fire—neither better nor worse—but always within the limits of the policy terms and conditions. This principle was established in the early days of fire insurance, because it was realized that to allow anyone to profit from the occurrence of a fire could lead to arson or to the neglect

of reasonable precautions against fire. Either event would also be harmful to the community.

Many cases dealing with indemnity have come before the courts, but the best known is that of *Castellain* v. *Preston* (1883), 11 Q.B.D. 380, C.A. The facts were as follows—

Preston was the owner of certain buildings in Liverpool which he had insured against fire with the plaintiff's company, the Liverpool and London and Globe Insurance Co. (Castellain was the Secretary). Preston had contracted to sell the buildings to a purchaser named Rayner who had paid a deposit on account of the purchase money. Before completion a fire occurred and the plaintiffs, ignorant of the existence of the contract to sell, paid to the defendants £330, the agreed amount of the loss.

Subsequently the conveyance was executed, the balance of the purchase money being paid by Rayner to Preston without any abatement on account of the fire damage, which had not been made good. Upon becoming aware of the full circumstances the insurance company (represented by Castellain) brought this action to recover the amount of £330 paid by them to Preston. He won the case, but the judgment was reversed on appeal and it was held that the plaintiffs were entitled to receive a sum equal to that paid by them under the policy. In passing judgment, Brett, L. J., said "the very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity and of indemnity only, and that this contract means that the insured, in case of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified. *That is the fundamental principle of insurance*, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the insured from obtaining a full indemnity or which will give the insured more than a full indemnity, that proposition must certainly be wrong".[1]

It was stated earlier that indemnity is subject to the terms and conditions of the policy. Thus indemnity could be limited by the sum insured or reduced by the application of average. Moreover, the sum insured is the *limit* of payment and does not necessarily mean that it will be payable even in the event of the total loss of the subject-matter. This is clearly explained in the following extract from a dictum of Pennefather, B., in the case of *Vance* v. *Forster* (1841), Ir. Circ. R. 47, "... a policy of insurance is a contract of indemnity, and while the insured may name any sum he likes as the sum for which he will pay a premium, he does not, by so proposing that sum, nor does the company by accepting the risk, conclude themselves as to the amount which the plaintiff is to recover in consequence of the loss, because although the plaintiff cannot recover beyond the sum upon each particular item . . . he cannot recover even that sum unless he proves that he has sustained damage, and then he will recover a sum commensurate to the loss which he has sustained."

As a corollary to indemnity, it follows that if the insured is indemnified under his policy, the insurer is entitled to any salvage or to any

[1]The sale of property is now governed by the Law of Property Act, 1925, see p. 104.

rights and remedies the insured may have against a third party, whereby any payment made may be reduced or extinguished. Such latter rights are known as subrogation rights. (See Chapter 6).

Any sum paid voluntarily to the insured, whether before or after indemnification, may also have the effect of reducing or extinguishing the insurer's liability, and this, referred to as indemnification *aliunde* (i.e. from another source), is dealt with at p. 90.

VALUED POLICIES

Valued policies are contracts by which the insurer agrees to accept the values mentioned in the policy as the amounts he will be liable to pay in the event of destruction (i.e. total loss) of the property insured thereby, irrespective of any appreciation or depreciation since the inception of the contract. It may appear that such policies infringe the principle of indemnity, but although this eventually may be so, it is very unlikely, for policies are normally issued on this basis only for property the value of which may be difficult of agreement at the time of loss, e.g. a work of art. The policy, therefore, establishes the value of the insured's interest *before the loss*, instead of leaving it to be proved *after the loss*, at which time there could be considerable argument as to the value. Provided the valuation is made in good faith, there seems to be no objection to valued policies, and this conclusion is confirmed by the following comments made in the course of two old law cases.

Lewis *v.* Rucker
(1761), 2 Burr. 1167

. . . the only effect of the valuation is fixing the prime cost . . . but . . . it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity. (Lord Mansfield.)

Feise *v.* Aguilar
(1811), 3 Taunt. 506

It has been held time and time again that it is unnecessary to prove the amount of interest under a valued policy. Therefore we must take it that the value insured is the plaintiff's interest.

Over-valuation can lead to the policy's being avoided where it can be proved that the valuation is grossly in excess of the real value, or where the valuation is so excessive as to make the policy a wagering contract, although the insurers were aware of the position. Where the policy states that the agreed sum insured is payable only *in the event of a total loss*, payment in the event of partial loss is based on the actual amount of the damage sustained.

The recent case of *Elcock and Another* v. *Thomson*, [1949] 2 All E.R. 381, dealt with a claim for partial damage under a valued policy which contained the following clause—

> The sum set opposite each item has been accepted by the underwriters and the insured as being the true value of the property insured and in the event of loss the said property will be assumed to be of such value and will be assessed accordingly.

There is no reference here to *total loss.*

The policy, taken out in 1940, insured the building of a mansion for £106,850, presumably a figure representing, at that time, the approximate cost of reinstatement in the event of a total loss. In 1947 the mansion and surrounding land were sold for £28,400 and the new owner's interest was accepted by the insurer, the original sum insured remaining unaltered. As the result of a serious fire, part of the mansion was severely damaged, and as the parties concerned could not agree on the amount recoverable under the policy (bearing in mind the agreed value basis) an action was held. Morris, J., in giving judgment, said that there appeared to be no decided case which afforded conclusive authority on the issues raised. He said, "The result is that, in my judgement, the percentage of actual depreciation resulting from the fire should be applied to the agreed values as set out in the policy, so as to arrive at the amount recoverable."

Of the purchase price of £28,400, he decided that the figure applicable to the mansion was £18,000 and after the fire, £12,600, i.e. depreciation in value of 30 per cent and he applied this percentage to the insured value of £106,850, thus producing a loss of £32,055.

The interesting point about this case is that the judge took the sale or market value merely for the purpose of ascertaining a percentage of depreciation which he then applied to the agreed value to find the amount recoverable. If the policy had not been on an agreed value basis, the amount recoverable would probably have been based on the cost of reinstatement.

Inventory and Valuation Clause

Particularly for household effects, some property owners have an inventory and valuation made of the articles they possess. The work is usually done by professional valuers, and where such an inventory and valuation is incorporated into the policy the sum set against each item is accepted by both insurer and insured as being evidence of the value of such property *at the date of valuation.*.In the event of loss it is agreed that—

(*a*) the production of invoices or other evidence of cost will not be required;

(*b*) reasonable allowance will be made for depreciation or appreciation; and

(*c*) the total liability of the insurer will not exceed the sum stated in the policy.

The incorporation of such a clause, therefore, *does not make the contract a valued policy.*

PAYMENT AND CALCULATION OF THE LOSS

Payment of the Loss

"The Insurer will pay to the Insured."

Payment here means payment in the currency of the realm or, as is now customary, by cheque payable to the order of the insured. If there is more than one insured, the cheque in settlement of the loss must be drawn to the order of all the interested parties, unless—

(*a*) any named party agrees, in writing to the insurer, for his or their name to be omitted;

(*b*) a letter of indemnity be given to the insurer by an insured who wants the names of one or more interested parties to be omitted and cannot or does not want to refer the matter to the interested parties concerned; circumstances in which such a letter has to be obtained are unusual, but if one is necessary it is usually worded—

TO THE .... (*insurer*)

RE FIRE.. (*date*)

In consideration of your paying to us without reference to........................ the sum of £.................... being the amount of the agreed loss under Policy No............ effected by us with you (on which policy appears the name of .... as an interested party) we hereby indemnify you from and against any claim by .... by reason of such payment being made without reference to (him/them) or otherwise in respect of the said loss.

(*Signed*) ....

(*Date*) ....

(*c*) The insured assigns the proceeds to another party when payment is made to the assignee.

If an insured so wishes, he can assign to any one he likes the proceeds payable following a loss, and he can do so without seeking permission from his insurers. Such assignment has no effect on the policy itself. It is, however, only the sum payable that can be so assigned; the policy otherwise remains unaltered. The assignment can take place before or after a loss, but the assignee has no more right to the proceeds than has the insured himself. Thus any defence the insurers may have against the insured is equally valid against the assignee. Notice of the assignment must be given by the insured to the insurers and is in the following form—

(To the insurer)
I hereby irrevocably authorize and direct you to pay to my assignee(s) .... of .... the whole of the insurance moneys payable by you to me in respect of the loss and damage sustained by me in consequence of the fire which occurred at .... on the .... and I hereby declare that his (their) receipt for such moneys shall be a valid receipt on my behalf for the same.

(*Signed*)..

In practice, the few occasions upon which such an assignment is made are generally those where an insured requests his insurer to pay the builder who has carried out the work involved in reinstating damage, or a bank which has lent money on the property insured.

Once the loss is agreed and payment made to the insured, it is no concern whatever of the insurer what the insured does with the money he receives. The insurer's side of the contract is completed by payment of a sum representing the indemnity given within the terms and limitations of the policy, and in the absence of any contrary circumstances their duty is then fulfilled.

Garnishee Order

This is the name given to an order obtained from the court by a person (the garnishor) against another person (the garnishee) from whom a debt is owing to a third party who is a debtor of the garnishor. For example, a claim made by insured A against insurer X has been settled for £500. A, however, owes B £600, so B obtains a garnishee order against X by which X is warned not to pay the amount of £500, which thus becomes attached by the garnishor B as creditor of A, to whom the £500 is owed by X. The effect of the order, then, is to transfer the debt to the garnishee.

Insurers are occasionally garnisheed in respect of a loss payable under a policy, but the following must be kept in mind—

(*a*) Liability under the policy must have been established.

(*b*) The amount of loss must have been ascertained before attachment can be made by garnishee proceedings.

(*c*) Payment by the insurer under a garnishee order is equivalent to a complete discharge of liability to the insured.

Receipt or Discharge

At one time it was the practice for insurers to get a discharge for all claim payments, either by a separate receipt or by one printed on the back of the cheque. With the passing of the Cheques Act, 1957, however, many insurers no longer demand receipts for payments by cheque. The cheque itself, after presentation, is regarded as evidence of payment.

valid discharge against all claimants. The insurer cannot obtain relief in such circumstances merely by paying the money into court, i.e. without recourse to interpleader. The expenses of the action have to be borne by the litigants.

Ex Gratia Payments

Ex gratia payments are those made "as an act of grace, i.e. where there is no strict legal liability or where liability is doubtful. When paying such amounts the insurer should always make it clear to the insured that they are made without any admission of liability.

There are many reasons for making *ex gratia* payments, some good and others not so good, but it is customary for insurers to be generous in their dealings with the public, although it must be admitted that competition plays its part.

The following are some of the reasons why *ex gratia* payments are considered—

1. A minor infringement of, or non-compliance with, a condition or warranty.
2. The omission, in good faith, to insure an item, by an insured who is meticulous in the care with which he normally arranges his insurances.
3. Where there is under-insurance on one item, but an adequate insurance over all.
4. Where the connexion of either the insured or the agent, or both, is so important that it is politic to make some payment.
5. It is sometimes considered to be a good form of advertisement although this can be overrated.

The number of *ex gratia* payments made depends entirely upon the insurer concerned, but there is no doubt that many more of these payments are made today than ever before. As already mentioned, this is partly due to competition, for no insurer likes to feel that he is less generous than his competitors.

Nevertheless, each possible *ex gratia* payment must be carefully considered, for insurers are, in fact, the custodians of a fund to which many have contributed, and that fund must be administered with discretion; it must not be misused. For example, there are certain losses, such as acid burns or those due to blatant or deliberate under-insurance, for which insurers have never agreed to make any payment, and it is hoped that this principle will be maintained.

Ex gratia payments vary from a pound or so to many thousands of pounds, but the same considerations should apply to them all, namely, that there are good reasons for making such payments.

When it has been decided that an *ex gratia* payment is to be made, it must be given quickly and generously. More harm than good is done by offering a figure which is not acceptable or only accepted with bad

Effect of Payment of Loss

The sum insured by a policy stands reduced by the amount paid for a loss until the ensuing renewal date, unless the amount of such loss is reinstated by endorsement and an additional premium paid. The reinstatement can be effected immediately, i.e. from the date the loss took place, or subsequently. (See also p. 67.)

Payment by Mistake

Even where an acceptance form has been taken, it is possible for an insurer to recover money paid if the payment to the insured was made by mistake. The mistake must be one of fact and it does not matter whether such payment is attributable to ignorance, inadvertence, or forgetfulness, provided at the time of payment the insurer is not acquainted with the facts. If he is but nevertheless makes payment, he cannot thereafter recover what has been paid.

A payment by mistake may be made in the following circumstances—

1. The policy may not have been operative at the time of loss, e.g.—
   (*a*) the renewal premium had not been paid within the prescribed time;
   (*b*) it was void from inception;
   (*c*) it had become void during its currency.
2. There may have been no liability for the loss itself, e.g.—
   (*a*) the property was never destroyed or damaged;
   (*b*) the loss was caused by an excepted peril or by arson (by the insured).
3. There may have been a mistake in the amount paid, e.g. over-estimation or non-admissible items without fraud. If the insured has been guilty of fraud, then all benefit is forfeited and the entire amount must be repaid.

Payment by mistake cannot, however, be recovered—

1. When payment is made *ex gratia* (See p. 49);
2. When, in the absence of fraud, a compromise payment is made;
3. Where the insurer waives inquiry.

Interpleader

Where conflicting claims are made to the policy money, provided—
(*a*) the insurer himself has no interest therein;
(*b*) the amount due to the insured has been ascertained;
(*c*) there are adverse claims for the payment of this amount;
the insurer is entitled to ask the parties concerned to settle their differences before the court or some other tribunal. This step is known as "interpleader." During the course of interpleader proceedings, the insurer may be directed to pay the money into court, thus obtaining a

valid discharge against all claimants. The insurer cannot obtain relief in such circumstances merely by paying the money into court, i.e. without recourse to interpleader. The expenses of the action have to be borne by the litigants.

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Nevertheless, each possible *ex gratia* payment must be carefully considered, for insurers are, in fact, the custodians of a fund to which many have contributed, and that fund must be administered with discretion; it must not be misused. For example, there are certain losses, such as acid burns or those due to blatant or deliberate under-insurance, for which insurers have never agreed to make any payment, and it is hoped that this principle will be maintained.

Ex gratia payments vary from a pound or so to many thousands of pounds, but the same considerations should apply to them all, namely, that there are good reasons for making such payments.

When it has been decided that an *ex gratia* payment is to be made, it must be given quickly and generously. More harm than good is done by offering a figure which is not acceptable or only accepted with bad

grace. Although the offer may be subsequently increased, the harm has been done, and the insured will be left dissatisfied.

It is often suggested that the making of an *ex gratia* payment by the insurer should be accompanied by the payment of back premium by the insured, where it is possible to calculate what the correct premium would have been if the policy had been correct at the time of the loss. This practice is inadvisable, for it may have the effect, so far as the insured is concerned, of completely nullifying the object of the *ex gratia* payment and lead him to believe that he has nothing for which to be grateful. It is far better for the insurer to make the payment on condition that the insured revises the policy *for the future*, thus confirming beyond doubt that the payment made was indeed "an act of grace" on their part.

Other features of *ex gratia* payments include the following—

Subrogation. The payments are made without admission of legal liability, and thus insurers deprive themselves of any subrogation rights they may possess.

Reinsurance. Treaty reinsurance arrangements usually make provision for *ex gratia* payments, i.e. the reinsurers agree automatically to follow the action of the ceding company, but permission may have to be obtained from facultative reinsurers, although even here special arrangements are often made whereby the ceding office can settle such losses without reference to the reinsurers.

Legality. In *Taunton* v. *Royal Insurance Co.* (1864), 2 Hem. & M. 135 (the *Lottie Sleigh* case) it was established that insurers are fully entitled to make such payments in the ordinary course of their business.

METHODS OF CALCULATING THE LOSS

"(The insurer will pay to the insured) the value of the property at the time of the happening of its destruction or the amount of such damage."

These words mean simply that the insurer will pay—

1. For property destroyed, the value of such property;
2. For property damaged, the amount of such damage.

From the adjuster's point of view (and here the word "adjuster" is applied to *anyone* who has to decide how much to pay, assuming liability is unquestionable) this is probably the most important part of the standard policy.

Value

What is meant by the word value? The usual definition of the word, as used here, is the worth of anything as estimated in terms of something else for which it can be exchanged, either in other goods or, as is customarily so, in money, and it is in this sense that value is inter-

preted. Over the years, however, the following modifications and limitations, some of which are incorporated into the policy, have been placed on the word so far as insurance is concerned.

1. The value is that at the time of the loss. Thus value at *any other time* is immaterial, although the market value after the loss rises or falls, e.g. following normal trading activities.

2. The value is that at the place of loss, i.e. the value at the nearest market. At the present time when the price of many goods or services is the same throughout the country, this may not seem very important, but there are still many commodities the price for which varies from place to place, for example, farming produce, coal; similarly, costs may vary for buildings and machinery.

3. Only the real value can be considered, i.e. the physical or material loss as expressed in a reduction of capital worth. This means that—

(*a*) sentimental value, however strong or important;

(*b*) prospective profit on property unsold at the time of the loss or other consequential loss of any kind

are all excluded

Whatever the basis upon which value is to be calculated, and although it may sometimes present difficulty, *the insured must be indemnified* (i.e. placed in the same position immediately after the loss as he was in before) *as far as is practicable within the terms and conditions of the policy.*

In the absence of legal proceedings, no interest is payable on the agreed amount of the loss once payment becomes due. If the claim is in dispute and the case is taken to court, the judge will use his discretion in deciding whether or not to award interest in addition to the amount awarded in settlement where the insured wins his action.

METHOD OF INDEMNIFICATION

General Considerations

There are various ways in which indemnity can be given. The two usual ways of giving an indemnity are—in the event of destruction—replacement by purchase at the place and at the price ruling at the time (i.e. market value); or—in the event of damage only—reinstatement or repair (both by the insured), in each instance within the limits of the sum(s) insured and for which payment in cash would normally be made by the insurer. As already stated, once the amount of loss is agreed and payment is made to the insured, it is no concern whatever of the insurers what the insured does with the money.

The insured must be neither better nor worse off than before the loss. Otherwise, more or less than an indemnity will be given. Hence factors such as depreciation, appreciation, and betterment, if any, must be taken into account.

Particular Considerations Connected with Basis of Settlement

1. Buildings

In spite of the foregoing remarks about value, it is not usually possible to bring market value into play when considering loss of buildings, because so many factors enter into the market value of such property, e.g. site, district, and local advantages and amenities, which have no bearing whatever upon the value for insurance purposes. In fact, some buildings have no market value as such, e.g. churches, schools. For these reasons nearly all building losses are settled on the basis of cost of reinstatement, and, provided the sum insured is adequate, an indemnity is given in this way. It may be argued that a new building is better than an old one and that a deduction should therefore be made from the cost of erecting a new building, but provided the old structure is well maintained, any deduction will usually be comparatively small and confined to those items which have a limited life, e.g. decorations, stoves, tanks. It follows that the new structure, as such, will probably not be very much better than the old one if the latter was properly built and maintained. If the building before the fire was in a poor condition, then a suitable allowance must be made for the fact that the building, when reinstated, will constitute an improvement when compared with the old one. Very occasionally a building is in such a dilapidated state that the insurer will give cover only for the value of the materials incorporated in the structure and which would have some worth if the building were to be demolished.

There are, too, many buildings or parts of buildings used for industrial purposes which have only a limited life, e.g. furnaces, which must be re-lined from time to time; also certain structures where chemical processes are carried out have to be rebuilt after being in use for a certain number of years. In such circumstances account must be taken of the remaining "life" of the structure in settling the loss. Whatever the circumstances, the aim must be to give as near an indemnity as possible.

The cost of reinstatement must be based on ordinary costs at the time and place of the loss; thus, increases in labour charges or costs of materials subsequent to the date of the fire are strictly not recoverable. Similarly, there is no liability for extraordinary costs, such as wages paid for working overtime in order to expedite reinstatement and thus to permit trading or production to be recommenced or to return to normal at an earlier date than would otherwise be so. If, however, it is considered advisable for overtime working to be carried on in order to reduce the insurer's loss or to prevent the loss from being aggravated, such costs are recoverable with the insurer's consent. It is also the current practice for contractors to agree to the working of a restricted

amount of overtime as a condition of employment and insurers have to accept this.

It is often necessary for temporary repairs to be carried out to prevent further damage to the building or, more likely, to machinery and other contents. With machinery the temporary protection may enable production to be maintained or to be restarted quickly. Payment for temporary building repairs depends upon the circumstances. If the temporary repairs are for the benefit of all property, the cost is usually shared among the insurers (if more than one) concerned. If the repairs benefit production, the consequential loss policy (if any) contributes to the cost. In the absence of such a policy, the insured himself must contribute to the cost.

With many people there is still confusion between market values and cost of reinstatement. The layman often cannot understand why a building in good repair having a market value of £2,000 can be insured for £5,000, i.e. the cost of rebuilding. The answer is that if the owner of the building likes living there, or obtains a good income from his trading, he wants his building back and can only do so by having it rebuilt. He is then indemnified. If, on the other hand, the owner *wants* to sell the building, for which the market value is £2,000 and is prepared to accept this figure, then payment by the insurer of the market value in the event of total loss would constitute an indemnity. Again, circumstances might arise where settlement based on market value could be justified if an insured had no intention of rebuilding after the loss.

There are, too, certain types of building which in practice cannot be rebuilt, particularly those of historic interest. It may be possible to pay a sum of money based on market value to enable the insured to buy another property of similar type, condition, and age somewhere else. The circumstances of each claim must be considered carefully and the insured given as near an indemnity as can be mutually agreed. If, however, the insured insists on settlement on the basis of reinstatement, the insurers cannot object, subject to the limit of the sum insured.

The preceding paragraphs relate mainly to the basis of settlement in the event of total or near total destruction. Compensation for partial damage is usually based on the cost of repair, the necessary deductions, if warranted, being made for depreciation, e.g. decorations or similar features of limited life.

Damage is sometimes caused to party walls, chimney stacks, or other common features of property, and the cost of repairing such damage is shared by the owners concerned. The chimney stacks of houses are not infrequently struck by lightning, and with a semi-detached house, for example, each owner, or his respective insurer, pays his share of the cost of repair according to the damage sustained by each property.

So far, it has been assumed that the insured is the owner of the building concerned, but it may be that, although the insured has an insurable interest, such interest is a limited one, e.g. that of tenant or lessor. In the event of total destruction and in the absence of any obligation to reinstate, the indemnity given to such persons depends upon the circumstances. Any interest in property is beneficial, and the extent of the benefit derived from the interest serves as the basis on which to arrive at an indemnity.

2. Contents Generally

Market value may or may not be taken as a basis of settlement; it depends on the article destroyed or damaged. Certain types of property under this heading are considered separately, but as a generalization it can be said that if it is possible to obtain replacement in the open market by the purchase of similar articles, both as regards type, age, and condition, then the market value basis is correct. If replacement by similar but new articles only is possible, then provided allowance is made for depreciation and wear and tear, the market value basis again gives an indemnity. Partial loss is dealt with by repair.

3. Documents, Manuscripts, and Business Books (if specifically insured)

The basis of settlement is reproduction cost based on value of materials as stationery plus cost of research (if necessary) and clerical labour expended in writing up. No liability attaches for the value to the insured of any information contained in such documents. A limit is usually placed on any one document, manuscript, or business book.

4. Farming Property

(*a*) *Agricultural Produce*

Agricultural produce refers to anything which is produced as the result of tilling the soil, and thus includes all crops, whether growing or harvested. Root crops are normally excluded unless specially mentioned. The basis of settlement is as follows—

Produce grown for sale. The price at the nearest market at the time of the fire, less the cost of preparing (e.g. threshing) and transport to market, because neither will be incurred.

Produce grown for consumption. The price at the nearest market at the time of the fire, less the cost of preparing, but plus the cost of transport from the market to the insured's premises.

Home-Grown Cereals Deficiency Payments Scheme. (An order of the Agricultural Act, 1959.)

Under this Scheme the Ministry of Food makes certain payments to

registered[1] growers of cereals. Such payments are based on the period 1st July in one year to 30th June in the next (termed the Cereal Year), and depend on the type of cereal grown.

Millable Wheat.[2] Payments relate to grain *sold and delivered* during the Cereal Year, which is divided into five periods, the payments per cwt. increasing the later the grain is sold and delivered. The Ministry fix seasonal standard prices per cwt., depending on the period (the "deficiency payment," as it is called), to be made to the grower, being the difference between the seasonal standard price and the average "at farm" (i.e. throughout the country) price (also calculated by the Ministry from various returns) realized during the same period. The payment, therefore, has no direct relation to the price realized by the farmer. An example will make this clear.

Wheat was sold and delivered by the farmer on 25th June, 19. . . At this time the Seasonal Standard Price fixed by the Ministry was 32s. 6d. per cwt. Some two to three months after the close of the period concerned the Ministry calculated that the average "at farm" price for the corresponding period was 19s. 10d. per cwt. and a deficiency payment at the rate of 12s. 8d. per cwt. was accordingly due to the grower. The fact that the grower received an entirely different price per cwt. is of no significance in determining this deficiency payment. What is significant, however, is that the efficient grower, who in any event gets a good yield and satisfactory price per cwt., gets a deficiency payment as well, thus encouraging all growers to improve both the yield and quality of their crops.

Millable Rye. Similar considerations as for wheat apply, apart from the fact that one standard price and one "at farm" price only are fixed.

Oats, Barley, and Mixed Corn Crops. Payments relate to the *acreage grown and harvested* or available for harvesting as grain, and are based on the difference between a fixed standard price per cwt. and the average "at farm" price per cwt. The resultant amount is then multiplied, firstly by the number of acres harvested and then by a figure representing the average country-wide yield per acre for a stated previous five-year period. The expression "*available for harvesting* as grain" is capable of wide interpretation, and is so regarded by the Ministry. In fact, the possibility of any of these crops being damaged by fire *before* the deficiency payment is earned is extremely unlikely. The deficiency payments in such circumstances and for rye are made two to three months after the end of the Cereal Year.

As all these deficiency payments are made only if the crops comply with the foregoing provisions, grain destroyed by fire or other insured

[1]I.e. registered by the appropriate Government department as a grower of cereals under the Scheme.

[2]*I.e. fit for conversion into flour for human consumption.*

peril *before* these conditions are fulfilled does not qualify for such payments under the Scheme. Provided the grower makes the necessary arrangement with his insurer, however, the latter will agree to make those payments, when known, in place of the Ministry. Subject otherwise to the terms and conditions of the policy this concession is granted by endorsing the policy as follows—

CEREALS DEFICIENCY PAYMENTS MEMORANDUM

It is hereby agreed and declared that the value of any cereal crops of the Insured's own growing included in this insurance shall for the purposes of this Policy (including the application of the Condition of Average) be deemed to include a sum equal to the amount of any deficiency payment which but for the occurrence of any destruction or damage hereby insured against would have become payable to the Insured by the Government under any deficiency Payments Scheme in force at the time of the destruction or damage.

Until the rate of deficiency payment or payment in advance has been fixed, no sum is payable in respect thereof.

In the event of loss, the procedure generally followed is to adjust the loss in the usual way, i.e. market value less expenses not incurred (as explained earlier), and to regard the payment then made as provisional, leaving outstanding the additional payment in respect of the deficiency scheme to be made at the appropriate time. Particular attention must be paid to the sum insured, for, as mentioned in the memorandum, average is applicable on the value of the produce *including* the deficiency payment. It is possible to estimate approximately the deficiency payment which will be forthcoming later; thus the total value can be approximately assessed at the time of loss for the purposes of applying average.

(*b*) *Farming* (*dead*) *Stock*

This comprises almost everything apart from implements and utensils of husbandry, and thus includes such items as manures, feeding stuff, seeds, fuel, and materials for general maintenance. Settlement is based on replacement costs because there will usually be little or no depreciation to be taken into account.

(*c*) *Implements and Utensils of Husbandry*

The basis of settlement is usually the cost of replacement less deductions for wear, tear, and depreciation generally. It is sometimes possible to find second-hand replacements, and, if similar in age and condition their cost constitutes an indemnity. Otherwise, some adjustment may have to be made.

intention to sell the animal, the estimated expenses not incurred in connexion with the sale must also be deducted. If the animal is to be replaced any expenses incurred in the replacement, e.g. delivery from the nearest market, must be allowed.

If death is the result of lightning, a veterinary surgeon's certificate (at the insured's expense) is required, certifying the cause of death. Claims by lightning must be dealt with immediately and most insurers incorporate a memorandum in the policy requiring the insured to telephone or telegraph the nearest branch office at once. The reason is that putrefaction rapidly sets in and unless the carcase can be inspected within a few hours it may have to be buried, thus making certification of death difficult.

(ii) *Injury*. It is often far from easy to decide on an appropriate figure as compensation for livestock injured following a fire. Some animals may gradually recover entirely, some only partly, and some may never recover to any useful extent. Although each claim is treated on its merits, the following methods of adjustment are possible.

(*a*) *Complete recovery*. Payment of veterinary surgeon's fees plus any loss sustained during the period between the fire and the recovery, e.g. reduced milk yield.

(*b*) *Partial recovery*. Loss of value based on the difference between the pre- and post-fire value of the animal; for example, a pedigree cow may be worth much less if future calving is likely to be affected.

(*c*) *Doubtful recovery*. Payment of the full market value may ultimately be necessary. In such circumstances, the animal may be humanely slaughtered if recovery is deemed to be remote.

Under (*b*) and (*c*) veterinary surgeon's fees are payable in addition, although the total payment should not exceed the pre-fire market value of the animal.

Other Government Subsidies. In addition to the deficiency payments already mentioned, there are in force at the present time various Statutory Instruments (arising out of the Agricultural Act, 1957) which make provision for guaranteed prices and assured markets for certain cattle, sheep and pigs, milk, eggs, and wool. Some fertilizers, too, also qualify for subsidy. In the event of loss involving any such live or dead stock, these Government Instruments should be kept in mind, since they may affect the settlement.

5. Household Goods and Personal Effects

The age and quality of these vary so much from household to household that it is often not possible to fix any one basis of settlement, but as a rule, replacement cost, less depreciation through wear and tear, can be taken as a guide.

The claim form in the appendix refers to original cost price (Col. 2) and date of purchase (Col. 3), but neither of these may be available. It is usually possible, however, to give an estimated value at the time of loss (Col. 4) (which, owing to appreciation, may be *more* than the cost price) and adjustment is on that figure, allowance being made for any salvage. With recently-acquired furniture it is usually possible to price the articles as new and to adjust the loss on this basis, making allowance, where applicable, for depreciation. Old furniture, however, often has virtually no sale value (unless it can rate as antique), but nevertheless the insured must be put in a position to replace it by something which will give similar service. Often some form of compromise has to be arranged. If antique furniture or articles are damaged or destroyed, the help of an expert may have to be enlisted. If repairs are possible, tradesmen's estimates should be obtained.

There are sometimes difficulties in matching units where if one unit is destroyed or damaged the remainder may have only a considerably depreciated value. For example, whereas a set of six antique chairs might be worth £300, five might be worth only £150 so that £150 would have to be paid following the destruction of one chair, unless it were possible to obtain an exact replacement.

Damage to the covering of one unit of a matching suite may result in paying for the recovering of the entire suite if it is not possible to match exactly the common covering material. An allowance may have to be made for wear and tear.

Carpets are usually capable of repair, but, if valuable, they sometimes lose value as a result, and some payment may have to be made in addition to the cost of repair.

Clothes do not normally present any difficulty. If destroyed the basis of settlement is cost price or replacement price, less a deduction for wear and tear or age. Often this deduction should be considerable, e.g. ladies' evening dresses which tend to become unfashionable in a comparatively short time.

6. Machinery and Plant

It is rare that second-hand machinery is available in the open market to replace that seriously damaged or destroyed, and settlement on a market value basis is therefore unusual. The basis of settlement usually adopted is either the cost price, with a deduction for depreciation through age and wear and tear, and possibly an allowance for appreciation; or the cost of replacement with a deduction for depreciation as above. The amount of depreciation is often difficult to decide, and it may be necessary to call for technical knowledge and advice from an expert in the trade. All machinery has a limited life and therefore depreciates year by year, the speed of depreciation depending on the

extent of use, the quality and content of the maintenance given and also whether the work done by the machinery goes out of fashion. Even very old machinery has some value if it is still capable of performing the purpose for which it was designed, and an indemnity can only be given by providing the insured with machinery which will perform similar functions subject always to deduction for depreciation and a contribution towards betterment, if any. Betterment here refers to the extent to which new machinery is superior to that which it replaces, for example, in production, cost of maintenance, or operation. The insurers are entitled to the benefit of any salvage realization from the scrap machinery, but will be liable for the cost of transporting the new machinery to the site and, where applicable, the cost of installation, all within the limits of the sum insured.

Partial damage is dealt with by the cost of repair, which will only be subject to deduction if the repaired machinery is in a better condition than it was before the loss.

7. Merchandise

The basis of settlement is "the market value of the goods *immediately anterior* to the fire." The reason for this provision is to protect the insurer against a possibly abnormal and temporary rise in price following a serious loss involving a commodity in keen demand. If payment were based on the increased price, a subsequent fall in the market would enable the insured to replace the goods destroyed at a lower price and so obtain a profit from the insurance.

With two commodities, tobacco and cotton, the market is likely to be particularly susceptible to influence from serious losses, any appreciable shortage of the quantity available being reflected in a rise in prevailing prices, so that merchants, in order to fulfil contracts, might have to buy at the increased prices. Insurers have realized that special consideration is necessary, and have agreed that for losses on tobacco any extra cost of replacement shall be payable; and that for losses on cotton the market value of like cotton immediately *after* the fire shall be adopted. The full wordings of the two clauses at present in use are as follows—

COTTON

(*a*) The liability of the Insurer shall be based on the market value of like Cotton immediately after such destruction or damage or, in the event of the Liverpool Cotton Market then being closed, the market value immediately after the next opening of the Liverpool Cotton Market;

(*b*) If at the time of its damage or destruction such Cotton is subject to any Price Control fixed by the Government or by any Authority acting on their behalf, the liability of the Insurer shall be based on such controlled price for Cotton of a like nature prevailing at the time of such damage or destruction;

(*c*) If the special provisions under Clauses (*a*) and (*b*) should not be operative it is understood and agreed that the liability of the Insurer shall not exceed the

market value of like Cotton immediately after such destruction or damage or in the event of destruction or damage occurring outside a trading period of the Liverpool Cotton Association Ltd. the market value immediately following the opening of the next trading period of the said Association.

MEMO. It is understood and agreed that, for the purposes of Average, the value of the property insured hereby shall be calculated on the same basis as that on which the loss is assessed.

TOBACCO

Notwithstanding anything herein contained to the contrary it is hereby declared and agreed that in the event of loss the basis of settlement shall be the cost price of the Tobacco (including Cigarettes and Cigars) delivered into Warehouse on this side with a further sum to cover all subsequent charges, interest, appreciation in value and extra cost of replacement, not being more altogether than the cost at which the destroyed or damaged Tobacco (including Cigarettes and Cigars) if capable of replacement can be replaced within 30 days after the date of the fire or of the commencement of any destruction of or damage to such property by any other peril hereby insured against. For the purpose of Average the value of the property hereby insured shall be calculated on the same principle as that on which the loss is to be assessed as aforesaid.

Contract price clause. Some sale contracts stipulate that if goods sold, but not delivered, are destroyed by fire while still at the risk of the vendor, the contract can be automatically cancelled by the purchaser. The vendor has lost the contract in such circumstances through no fault of his own and is therefore entitled to be indemnified on the basis of the contract price, although this may be to his advantage or disadvantage according to the state of the market. If the market value has fallen since the contract was completed, he will benefit, but if it has risen settlement on the contract price may be to his disadvantage. The Contract Clause is endorsed on the policy where these circumstances may apply and is given in full hereunder.

It is hereby agreed and declared that in respect only of Goods sold but not delivered for which the Insured is responsible and with regard to which under the conditions of Sale the Sale Contract is by reason of the fire cancelled, either wholly or to the extent of the loss or damage, the liability of the Insurer shall be based on the Contract Price, and for the purpose of Average the value of all goods to which this Clause would in the event of loss or damage be applicable shall be ascertained on the same basis.

Where the contract is not so cancelled, payment of the market value immediately before the fire should give the insured an indemnity. If the price has changed since the contract was completed, the insured should be able to replace at the current market price, whether this be the same as or higher or lower than the original price paid and so be able to fulfil his contract without loss to himself.

Percentage of fire loss. In respect only of policies covering merchandise stored at a rental in public warehouses, wharves, docks, yards, and quays anywhere in Great Britain, Ireland or Northern Ireland, or in hop warehouses in London, the owners of such mer-

chandise can include an item covering consequential loss expressed as a percentage (not exceeding 10 per cent) of the fire loss. For example, on a sum insured of £1,000, the additional item can be for 10 per cent of £1,000 = £100 — making a total sum insured of £1,100. The following clause is incorporated into the policy.

> The sum recoverable under item 2 of this policy shall in no case exceed 10 per cent of the net fire loss (i.e. after deduction of salvage recovered or allowed) paid under item 1 hereof.

If the wharfingers or other bailees accept responsibility for fire damage to the merchandise, the owner can still insure up to 10 per cent of its value by a separate policy in his own name. Payment is limited to that proportion of the loss which the sum insured bears to the value of the merchandise, but not exceeding the specified percentage.

This percentage additional relates to profit, and should, strictly, be insured under a consequential loss policy, but there are various arguments in favour of its retention in these particular circumstances, one of which is that it would be difficult to establish in an orthodox manner the profit lost.

8. National Insurance Stamps (if specifically insured)

Adjustment is based on the cost of replacement, provided the insured is held liable by the Ministry of Pensions and National Insurance, subject to no more specific insurance and to an overall limit. The Ministry is prepared to give credit for loose stamps or for stamps affixed to cards destroyed or damaged, provided satisfactory evidence of their pre-fire existence is available. A declaration is normally necessary, supported by the evidence of some person(s) with knowledge that the loose stamps to the value claimed were in existence or that the cards bore the number of stamps the value of which is claimed. In the absence of such satisfactory evidence, no allowance will be made.

9. Patterns, Models, Moulds (if specifically insured)

Settlement is based on reproduction, i.e. cost of materials plus labour charges, subject to any limit named in the policy per pattern, model, or mould. There should be no payment for obsolete patterns which are virtually worthless, but if they are not entirely obsolete, i.e. they *might* be used again, some compromise figure is usually agreed. An allowance must in any event be made for any depreciation through wear and tear.

10. Plans, Designs, Drawings (if specifically insured)

Here again the basis is reproduction, i.e. cost of materials plus labour charges, subject to a limit in respect of any one plan, design, or drawing. There is usually no reason to make any deduction for

depreciation, but no payment should be made for obsolete plans, designs, or drawings.

11. Stock-in-trade

Where stock-in-trade is destroyed payment on the basis of market value at the time and place of the loss normally gives an indemnity. Market value here is the cost to replace goods lost and so excludes any element of profit. This is so with the merchant, whether he be a wholesaler or retailer. If the former, he replaces his stock by buying it from the manufacturer, and having restocked his warehouse he can again sell to the retailer and so make his profit. Similarly, the retailer can replace by buying from the wholesaler and then sell again to the public. The insurer must be given the benefit of any trade discounts and other concessions enjoyed by the insured in the course of his business. Little difficulty arises from such losses, and the only time complications may arise is when, at the time of the loss, there is no available market. No hard and fast rule can be laid down to meet such circumstances. The stock may be obsolete or obsolescent and have little or no value. But, while *seemingly obsolete*, it may have potential future value. Moreover, it may be possible to replace it by purchase at the premises of a manufacturer who still has some of the stock available, when cost plus transport probably constitutes an indemnity. In all these circumstances value is dependent on fact, which must take into consideration all the relevant circumstances.

Stock-in-trade destroyed on the premises of a manufacturer sometimes presents difficulties, because two different views are expressed when accrued profit is considered.

The manufacture of goods entails the use of raw materials which are manipulated to produce the finished product. In the process of manufacture labour charges are incurred together with certain direct overhead charges, such as light and heat, and a proportion of indirect overhead charges, such as salaries of executive officials, the whole adding up to the cost of production, i.e. the cost price to the manufacturer. He then fixes his selling price, the difference being his profit. If he sells his product as soon as or before he produces the finished article his profit is accrued, whereas if he has to produce the article and then endeavour to sell it, his profit is anticipated.

Whether the profit is accrued or anticipated, one view is that since the insured is the manufacturer, he can produce similar goods to replace those destroyed and thus is indemnified by payment based on cost of production.

The other view is that cost of production is merely the sum of the cost of materials plus labour and certain overhead charges, whereas the finished article is an independent marketable commodity with a

distinct value of its own dependent on supply and demand. Thus, if there is a constant demand for the articles the manufacturer can argue that he cannot make up the time lost, i.e. the time spent in producing the articles which have been destroyed. He can make other articles, but if owing to demand these, too, are sold before or during production the accrued profit on those destroyed is irretrievably lost and therefore indemnity should be based on the selling price.

It is a fact that loss of profit should be properly insured by a consequential loss policy, which so far as the manufacturer is concerned sets out to indemnify him against loss (i.e. loss of future earnings) arising from the interruption of his business by reason of fire or any other insured peril. A fire involving the destruction of completed work or work-in-progress normally affects turnover and payment under a loss of profits policy, either for loss of gross profit or increased cost of working, or both, may in consequence be made.

It is probably true that most, if not all, insurers prefer to deal with any loss of profit under a consequential loss policy. It is equally true that, subject to adequate sums insured under both fire and consequential loss policies (if applicable and subject to any particular terms and conditions relative thereto), an insured should, between the two, secure indemnity in respect of any claim properly falling within their scope. If, however, it is desired to meet losses in respect of finished stock on the basis of selling price, two important features must be kept in mind—

1. The sum insured under the material policy must have been fixed accordingly, declarations (if any) being made on the same basis.
2. Care must be taken in the event of loss to see that any payment made under any consequential loss policy is suitably adjusted to take into account the material policy settlement.

There are occasions, e.g. falling markets, when finished stock at the time of loss can only be sold at a price less than the original cost of production. Here payment based on such cost gives more than an indemnity, so some adjustment must be made.

Summing up, it is apparent that sometimes cost of production may not represent a proper indemnity, and the facts of each particular claim must therefore be considered in arriving at the amount recoverable. The method by which the insurances were arranged may have some bearing on the problem.

REINSTATEMENT BY INSURER

". . . or at its option reinstate or replace such property or any part thereof.".

These words give the insurers the right, if they wish, to settle the insured's loss in kind instead of by a cash payment. It is an option rarely exercised, because of the many drawbacks involved. Once insurers

elect to reinstate, the contract becomes one of reinstatement, and such reinstatement must be carried out adequately and to the insured's reasonable satisfaction. Where goods are concerned, like for like, as far as possible, must be given, and it is doubtful if an insured could criticize such a settlement, but reinstatement of buildings can prove difficult, although the insurers need only rebuild or restore the damaged structure to a condition substantially the same as before.

The disadvantages of reinstatement by the insurers are—

1. As the contract becomes one of reinstatement, no subsequent withdrawal is possible even though unforeseen circumstances arise to increase the cost.

2. In the event of failure to complete the contract the insurers may become liable for damages.

The case of *Brown* v. *Royal Insurance Co.* (1859), 1 E. & E. 853, illustrates this. The defendants had elected to reinstate, but after the work had been commenced the Commissioners of Sewers condemned the premises as dangerous. The insurers then pleaded that the dangerous condition of the building had not been caused by the fire and that, by the removal of the building, performance of reinstatement was rendered impossible. It was held, however, that the defendants had failed to prove that reinstatement was impossible, and although they might have shown that performance had become more expensive than they had foreseen, still, having elected to reinstate, they were bound by their election and must perform the contract or pay damages for not doing so.

In *Anderson* v. *Commercial Union Assurance Co. Ltd.* (1885), 55 L.J. (Q.B.) 146, the insurers had elected to reinstate machinery destroyed by fire, but the insured, who had been tenants only, were not permitted to return to the building that they formerly occupied. It was held that the inability to reinstate on the original site did not (*a*) relieve the insurers of their election to reinstate, provided reinstatement could be carried out in premises within a reasonable distance of those destroyed; and (*b*) give the insured the right to be paid in money.

3. If the premises when rebuilt are proved to be inferior to the original premises, the insurers are liable for damages, *Alchorne* v. *Savill* (1825), 4 L.J. (O.S.) Ch. 47. If bad workmanship is proved, the cost of remedying it has to be met by the insurers (who may in turn be able to recover from the person directly responsible, e.g. the builder) (*Times Fire Insurance Co.* v. *Hawke* (1858), 1 F. & F. 406).

4. The insurers are their own insurers during reinstatement and must make good any damage by fire occurring within this period (*Smith* v. *Colonial Mutual Fire Insurance Co.* (1880), 6 Vict. L.R. 200).

5. The insurers are responsible for any consequential loss caused by defects in the work involved in reinstatement or by any undue delay in completion.

6. Since the insured is not obliged to share in the cost of reinstatement, the insurers cannot take advantage of any condition of average to which the sum insured may be subject.

An insured can, if he so desires, be awkward in such circumstances and find fault with the work of reinstatement as it progresses. It is true that, according to the policy conditions (dealt with later), the insurers are obliged only to hand over a building substantially the same as before, but an awkward insured can make life very difficult for the insurer. It is apparent, therefore, that an election to reinstate is very rarely exercised, although there are times when the option, or a threat to apply the option, is invoked. Examples are as follows—

1. Where reinstatement or replacement by the insurers can be carried out more cheaply than by a cash payment. This applies mainly to articles of jewellery or similar property, where the insurers often get special terms.
2. Where an insured proves very difficult during negotiations, a threat to reinstate may bring about a change in his attitude.
3. If there is any suspicion of fraud.
4. Where several interested parties have insured the property with two or more insurers, reinstatement may be the only satisfactory way from the insurers' point of view of settling the individual claims.

The well-known cases of *Scottish Amicable Heritable Securities Association* v. *Northern Assurance Co.* (1883), 11 R. (Ct. of Sess.) 287, and *Glasgow Provident Investment Society* v. *Westminster Fire Office* (1887), 14 R. (Ct. of Sess.) 947, illustrate example (4). Both arose out of a fire which occurred in some premises in Glasgow. Two mortgagees were interested, the first having insured the property with the "Northern," the second with the "Westminster." The first case was fought on the grounds that contribution applied between the two policies, but it was held that the plaintiffs were entitled to recover in full since the interests under the respective insurances, being different, the rule of contribution did not apply. Thus the judgment was similar to that in *North British & Mercantile Insurance Co.* v. *Liverpool and London & Globe Insurance Co.* (1877), 5 Ch. D. 569.[1]

The Scottish Amicable Heritable Securities Association, instead of expending the policy moneys in reinstatement, used them to reduce their outstanding mortgage, and thus left the second mortgagees, the Glasgow Provident Investment Society, with a greatly depreciated security. The second mortgagees, unable to persuade the "Westminster" that they were also entitled to claim under their policy, successfully sued the company concerned and this judgment was upheld on appeal by the House of Lords. Payment of the loss was therefore duplicated, but could have been avoided if reinstatement had been enforced initially.

[1]See p. 132.

CHAPTER 5

THE STANDARD POLICY (III)

THE operative clause, discussed in the previous chapter, concludes by limiting the insurers' liability to—

(*a*) the sum insured in respect of each item
(*b*) the total sum insured by the policy
or
(*c*) such other sum or sums as may be substituted by signed endorsements.

} expressed in the Schedule

THE SCHEDULE

Sums insured are shown against a description of the property insured in the schedule which, in addition, incorporates—

(*a*) the name(s) and address(es) of the insured;
(*b*) the period of insurance;
(*c*) first and annual premiums;
(*d*) the renewal date.

The schedule thus sets out all the essential details relative to the particular contract. It is, in effect, the written part of the policy, and if any such part conflicts with the remainder of the policy, i.e. the printed part, the written part prevails, whether or not the insurer so intended. It is the insurer who drafts the policy, and he must therefore express clearly and accurately the intentions of both parties. If he so fails to do, the insured is given the benefit of any doubtful words. Ambiguity may have the effect of rendering the policy void if the contract cannot be understood by the ordinary rules of construction.

Generally, the intention of the parties decides the construction of a policy if any doubt exists as to its meaning. Words are understood to be used in their everyday sense, unless clearly intended otherwise.

The Insured

Although the respective interests of the insured, if more than one, are often given, e.g. lessor, mortgagee, it is not essential for this to be done, for in the event of loss the onus of proof of loss rests upon each party named as "the insured." Although, in practice, difficulty rarely arises, it is possible for one or more interested persons to suffer no loss although the property insured has been damaged by an insured peril. If there is more than one named insured, the addresses of the others should be given because in the event of a claim it may be necessary to get in touch with them.

The Property Insured

This is the subject-matter of the insurance, and it must be so described in relation to nature and locality as to make it clear beyond any doubt that what is covered by the policy is that intended to be covered by the insured. It sometimes happens that, after a loss has occurred, property damaged or destroyed is not covered by the policy according to the description of the property therein, although the insured is certain he meant it to be included. In such circumstances all the available information and facts must be taken into consideration. Reference may be made to the proposal or order papers, to the agent or inspector, or to any other source which may help to decide whether or not the insured has grounds for his attitude. If the evidence is not reasonably conclusive the insurers may nevertheless treat the insured leniently according to the circumstances. Similar considerations apply to other genuine mistakes or omissions, e.g. a particular peril not covered. Sometimes rectification (see p. 68) may be sought.

The Sum or Sums Insured

The sum placed against each item of property insured is the insurer's maximum liability for that item. If there is under-insurance a partial loss may mean the payment of the sum insured, whereas over-insurance may mean the payment of something less than the sum insured even in the event of the total destruction of the property. Each sum insured is independent of the others, so over-insurance under one item may not be used to counteract under-insurance under another.

Since a contract of fire insurance is one to pay a specific amount (the sum insured) during a specified period, it follows that the payment of a sum following a claim completes the contract to that extent, thus leaving in force only the difference between the sum insured and the payment made for the remainder of the term. Further losses have a similar effect, reducing the balance left each time by the payment made. For example, a payment of £500 under a policy with a sum insured of £2,000 leaves only £1,500 to meet any further claims until the ensuing renewal date, when payment of the renewal premium automatically reinstates the policy at its original figure. If the damaged property is replaced or repaired the amount of such damage (in this example £500) must be reinstated in the policy from the date of such replacement or repair and a pro rata additional premium paid if cover is wanted for the original sum insured. This means, in effect, that a subsidiary contract has been entered into for the remainder of the period.

Period of Insurance

This has already been considered. The expiry time in the Standard policy is 4 o'clock in the afternoon.

RECTIFICATION

Rectification means the correction of a policy. It arises when, following the conclusion of a contract, a policy is afterwards issued which is not in accordance with the contract made. Then, either the insured or the insurer may claim to have the policy rectified so as to represent the true agreement. If the insured initially accepts the policy without raising any objection, there is a strong presumption that it does in fact afford evidence of the contract made, especially if, as is usually so, the policy contains a warning to the insured to read it and to return it for correction if it has been prepared inaccurately.

If it is asserted by either party that the policy has not been accurately prepared, such assertion must be clearly proved, and it must also be shown that the parties, at the time the contract was effected, were in complete agreement as to its terms. If they were not, so that neither party could agree the terms wanted or given by the other, then the policy will probably be void from inception.

Rectification can be claimed after loss or after renewal, however long delayed, but the longer the policy is retained without objections by either party, the stronger must be the evidence required to displace the presumption that the policy embodies the real contract. Nevertheless, delay on the part of either party does not indicate acceptance. The Limitation Act, 1939,[1] would not apply to rectification as here considered.

Rectification can take place by agreement between the parties, when the policy is amended accordingly, or by order of the court if the parties cannot agree among themselves. If reference to the court is necessary the party claiming rectification must prove the existence of a contract which was followed by the issue of a policy not accurately representing the terms of such contract. Parole evidence, although inadmissible for the purpose of varying the policy as it stands, is admissible to show that there was, in fact, a mutual mistake and that the policy (i.e. the written evidence of the contract) did not express what was clearly agreed between the parties.

THE CONDITIONS

In Chapter 3 reference was made to the fact that the majority of the Standard Policy conditions are directly concerned with the liability of the insurer. For this reason they are important and the claims official must be certain that he can interpret them correctly when dealing with losses. The conditions are now considered in detail.

MISDESCRIPTION

Condition 1. This policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular.

[1]See p. 88.

A breach of this condition makes *the whole policy* voidable at the option of the insurer. The effect of this condition was considered in Chapter 2 where the recommendations of the Law Reform Committee were outlined. It is justifiable that the whole policy is voidable in the circumstances set out, for any breach of the condition goes to the root of the contract.

The necessity to give accurate information is to enable the insurer to assess the risk, and to misrepresent any material facts may affect the assessment of that risk. In general, whether misrepresentation be innocent or fraudulent, if the underwriter is misled the policy becomes voidable at his option.

Misdescription is in a similar category to misrepresentation and is subject to the same considerations. The description of the property to be covered must be accurate *in all material particulars*, including, *inter alia*, locality and user.

The non-disclosure of a material fact again can be innocent or fraudulent, but, either way, the insurer can avoid the policy if he so wishes.

However, insurers do not take advantage of 'technical breaches" to defeat an otherwise honest claim.

The reader should notice the use of the word "voidable" in this condition. A voidable contract is one which remains valid but can be avoided (i.e. rendered ineffective) at the option of one of the parties, here the insurer. If a contract is said to be "void" it means that there never was a contract in the first place, e.g. lack of insurable interest.

Simple examples of misrepresentation, misdescription and non-disclosure are given hereunder.

Misrepresentation. A proposer states his claims record is clean although he has had several serious fires while insured with other insurers.

Misdescription. Where property is described as wholly brick built, whereas a large part is built of wood.

Non-disclosure. An insured does not disclose the fact that he has been declined by other insurers, although not specifically asked the question, as may happen when no proposal form is used.

ALTERATION

Condition 2. This policy shall be avoided with respect to any item thereof in regard to which there be any alteration after the commencement of this insurance

(1) by removal

or (2) whereby the risk of destruction or damage is increased

or (3) whereby the insured's interest ceases except by will or operation of law,

unless such alteration be admitted by memorandum signed on behalf of the insurer by one of its duly authorized officials.

This condition operates once the policy has commenced and deals with three possible changes—removal, increase in risk, and change of interest.

REMOVAL

The contract is to cover property identified as being situated at a particular place. When, therefore, that identity is destroyed, the contract ceases to be valid even if the new location offers a reduction in risk.[1]

INCREASE IN RISK

The increase in risk must be material, and the onus of proving (*a*) that there has been any such increase in risk and (*b*) that the alteration has not been sanctioned, falls on the insurers. At common law, in the absence of this condition increase in risk would not affect the validity of the policy if the identity of the subject-matter were not changed, provided there was no evidence of fraud. Thus a building described as a carpenter's shop would still be correct whether or not it housed machinery, but such a building used for manual work only and insured on a standard policy form would attract a higher rate and so constitute an increase in risk if machinery were subsequently introduced. The presence of this condition means that any loss, *however caused*, can be avoided if in fact it is proved that there has been a material increase in risk, and, whatever may be the practice of some insurers, this is the legal position. This statement is emphasized because students sometimes think that in these circumstances the insurer would—

(*a*) date back the increased rate to its inception and pay the loss; or

(*b*) pay such a proportion of the loss as the rate charged bears to that which should have been charged.

So far as the examination room is concerned, and indeed for the majority of, if not all, insurers, both these statements are wrong. Insurers may waive the breach or pay the claim *ex gratia*, but this depends on individual practice.

This condition, therefore, goes further than the common law although, as with Condition 1, insurers do not apply it harshly. In practice, breaches are often waived, especially for interests such as those of mortgagees, or lessors, who may have no control over the occupation of the buildings concerned.

corn, was on one occasion only used for drying bark salvaged from a sunken vessel in a nearby river. Although it was agreed that a higher rate would be charged for bark drying, it was held that use on this single occasion did not invalidate the policy.

CHANGE OF INTEREST

The contract is a personal one between insurer and insured, and once the named insured ceases to have any interest in the property described the contract ceases to have any validity. This merely confirms the legal position, for no right of recovery is possible if no insurable interest exists in the policy at the time of the loss. If the new owner wishes to have the benefit of the policy, the insurer must be notified and given the opportunity of investigation just as he did with the former insured. If, after investigation, the insurer is satisfied, he will assign the policy to the new interest. There are times, however, when notification is difficult or even impossible, and it would be unfair to penalize the party to whom the responsibility of insuring automatically passes. Thus in the event of the death of the insured, beneficiaries may not be aware of their interest until some time after; hence the policy covers their interest (or that of the deceased's administrators or executors) until the property has passed to such beneficiaries, *when they must take steps to have the policy vested in their interest if they wish the protection of their interest to be continued.* Operation of law also includes the protection of trustees in bankruptcy, and the passing of property under the Agricultural Holdings Act, 1948. Sect. 12 (1) and 47 (1) of this Act deal with the ownership of crops left on a farm by an outgoing tenant, following notice to quit by his landlord. In *Thomas* v. *National Farmers' Union Mutual Insurance Society Ltd.*, [1961] 1 All E.R. 363, it was held that such property passes to the landlord by operation of law. If, therefore, it is destroyed or damaged by fire, he is entitled to recover under any valid policy taken out by the tenant. The tenant acquires the right to compensation under another provision of the Act.

When more than one insured is named, the policy normally remains valid so long as one or more of the parties named retains an insurable interest. As a general rule, however, a change of interest of the beneficial owner requires notification to ensure the continued validity of the policy, whereas changes of interest of mortgagees or lessors (in the absence of increase in risk) are not so regarded.

Similar considerations apply to business firms or partnerships. The overriding consideration is the relationship of the original insured to the insurer. A change of partnership constitutes a change of interest; similarly when an insured trading on his own takes in a partner. It is the personal nature of the contract that is so important, and any change affecting it must be notified to the insurers.

Removal

The contract is to cover property identified as being situated at a particular place. When, therefore, that identity is destroyed, the contract ceases to be valid even if the new location offers a reduction in risk.[1]

Increase in Risk

The increase in risk must be material, and the onus of proving (*a*) that there has been any such increase in risk and (*b*) that the alteration has not been sanctioned, falls on the insurers. At common law, in the absence of this condition increase in risk would not affect the validity of the policy if the identity of the subject-matter were not changed, provided there was no evidence of fraud. Thus a building described as a carpenter's shop would still be correct whether or not it housed machinery, but such a building used for manual work only and insured on a standard policy form would attract a higher rate and so constitute an increase in risk if machinery were subsequently introduced. The presence of this condition means that any loss, *however caused*, can be avoided if in fact it is proved that there has been a material increase in risk, and, whatever may be the practice of some insurers, this is the legal position. This statement is emphasized because students sometimes think that in these circumstances the insurer would—

(*a*) date back the increased rate to its inception and pay the loss; or

(*b*) pay such a proportion of the loss as the rate charged bears to that which should have been charged.

So far as the examination room is concerned, and indeed for the majority of, if not all, insurers, both these statements are wrong. Insurers may waive the breach or pay the claim *ex gratia*, but this depends on individual practice.

This condition, therefore, goes further than the common law although, as with Condition 1, insurers do not apply it harshly. In practice, breaches are often waived, especially for interests such as those of mortgagees, or lessors, who may have no control over the occupation of the buildings concerned.

The increase in risk must be reasonably permanent or continuous, since the condition refers to any "*alteration* . . . whereby the risk of destruction or damage is increased." Thus the casual introduction of a hazardous feature would not necessarily avoid the policy, provided the description of the subject-matter remained accurate, unless the policy incorporated an absolute prohibition. The case of *Shaw* v. *Robberds* (1837), 6 Ad. & El. 75, deals with this. A kiln, normally used for drying

[1] The policy may allow the temporary removal of property within certain limitations but the remarks apply to the situation specified in the policy.

corn, was on one occasion only used for drying bark salvaged from a sunken vessel in a nearby river. Although it was agreed that a higher rate would be charged for bark drying, it was held that use on this single occasion did not invalidate the policy.

Change of Interest

The contract is a personal one between insurer and insured, and once the named insured ceases to have any interest in the property described the contract ceases to have any validity. This merely confirms the legal position, for no right of recovery is possible if no insurable interest exists in the policy at the time of the loss. If the new owner wishes to have the benefit of the policy, the insurer must be notified and given the opportunity of investigation just as he did with the former insured. If, after investigation, the insurer is satisfied, he will assign the policy to the new interest. There are times, however, when notification is difficult or even impossible, and it would be unfair to penalize the party to whom the responsibility of insuring automatically passes. Thus in the event of the death of the insured, beneficiaries may not be aware of their interest until some time after; hence the policy covers their interest (or that of the deceased's administrators or executors) until the property has passed to such beneficiaries, *when they must take steps to have the policy vested in their interest if they wish the protection of their interest to be continued.* Operation of law also includes the protection of trustees in bankruptcy, and the passing of property under the Agricultural Holdings Act, 1948. Sect. 12 (1) and 47 (1) of this Act deal with the ownership of crops left on a farm by an outgoing tenant, following notice to quit by his landlord. In *Thomas* v. *National Farmers' Union Mutual Insurance Society Ltd.*, [1961] 1 All E.R. 363, it was held that such property passes to the landlord by operation of law. If, therefore, it is destroyed or damaged by fire, he is entitled to recover under any valid policy taken out by the tenant. The tenant acquires the right to compensation under another provision of the Act.

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Similar considerations apply to business firms or partnerships. The overriding consideration is the relationship of the original insured to the insurer. A change of partnership constitutes a change of interest; similarly when an insured trading on his own takes in a partner. It is the personal nature of the contract that is so important, and any change affecting it must be notified to the insurers.

In all three forms of alteration only the particular item concerned is of no effect and the policy ceases to apply thereto as from the date of the breach of the condition. This is reasonable, since it would be unfair to penalize the insured by avoiding the other items in the policy, because the contract, so far as they are concerned, is not affected in any way. If the policy is to remain valid for the particular item(s), the insurer must agree the alteration and confirm it by the issue of a suitable endorsement.

EXCLUSIONS

Condition 3. This policy does not cover—

(*a*) destruction or damage by explosion (whether the explosion be occasioned by fire or otherwise) except as stated on the face of this policy;

(*b*) loss or destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss directly or indirectly caused by or contributed to by or arising from ionizing radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel;

(*c*) goods held in trust or on commission, money, securities, stamps, documents, manuscripts, business books, patterns, models, moulds, plans, designs, explosives unless specially mentioned as insured by this policy.

(*a*) Exclusion of Explosion

The limited explosion cover afforded by the policy has already been considered (Chapter 3) and needs no amplification. The inclusion of the words "whether . . . occasioned by fire . . ." overrides proximate cause for, being essentially a *fire* policy, property damaged by explosion caused by fire, where fire was the proximate cause, would be covered in the absence of these words.

Explosion has been defined in many ways, but from an insurance point of view the best definition reads: ". . . anything which causes a sudden increase in pressure in the surrounding air, or gases, from sudden and violent expansions of any substance in their neighbourhood. It is a bursting with a loud discharge."[1]

From the insurer's point of view, most explosions can be placed in two groups: the pure concussion type (often called "black" explosion), and the very rapid combustion type (often called "red" explosion). A recent example of the former was the sudden explosion of a vessel used for a chemical process and working under a normal pressure of 60 lb. Through the inadvertent introduction of another chemical the pressure rose to over 600 lb. and, soon after, the container exploded violently, causing damage amounting to nearly £10,000. No fire ensued. An example of the "red" type is the explosion of carbonaceous dusts, e.g. those present in a flour mill. Such explosions are often initially minor, but of sufficient violence to disturb large dust deposits nearby, leading to a secondary and usually much more violent explosion.

[1]Harris's *Technological Dictionary of Insurance Chemistry*.

Into whichever group an explosion falls, the damage occasioned thereby is due to concussion, and it is this damage the policy sets out to exclude. Attempts have been made in the past to argue that the so-called "red" explosion is merely a form of rapid combustion, but the decision in the two cases given hereunder confirms that damage so occasioned is not fire damage within the meaning of the policy.

Everett *v.* London Assurance
(1865), 19 C.B. (N.S.) 126

The explosion of a powder magazine at Erith, Kent, on 1st October, 1864, gave rise to claims for damage by concussion to property in the neighbourhood. It was held that such damage was not covered. During the hearing, Willis, J., said ". . . no person would say it [the damage] was occasioned by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere.',

Stanley *v.* Western Insurance Co.
(1868), L.R. 3 Exch. 71

This case arose out of a claim for damage caused by fire and explosion. A leakage occurred in the pipe of a still used for extracting oil from shoddy, and, in consequence, inflammable gases which had been generated in the process escaped, caught fire, and subsequently caused a violent explosion, blowing up the buildings, after which the fire became general. The policy contained a clause excluding liability for loss or damage caused by explosion, except such as should arise from the explosion of gas. It was held that (1) the insurers were not liable for any damage caused by the explosion, and (2) the word "gas" meant coal gas.

During the hearing, the judge said: "The words of the policy are to be construed, not according to their strictly philosophical or scientific meaning, but *in their ordinary or popular sense.* With respect to the extent of the damage, even if the consequence of the explosion was to create a concussion that caused the existing fire to burn more strongly than before, that (i.e. the fire) would be a loss by fire within the policy and not within the exception, but as to what was caused by the explosion, *the defendants are not liable.*"

It will be noticed in the last case that if the effect of the explosion is to make the fire burn more fiercely, such fire damage is covered.

It is difficult to deal with claims where explosions occur during a fire, and it is almost impossible to segregate the fire damage from that caused by the explosion. Such claims must be dealt with according to their particular circumstances and some form of compromise settlement reached, but provided the cause of the fire is not the operation of one of the excepted perils, the policy condition must be strictly interpreted, i.e. all *fire* damage can be *included,* but all *explosion* damage must be *excluded.*

The exclusion does not apply to property deliberately destroyed by explosion (i.e. blown up) to prevent the spread of fire. This is deemed to be fire damage.

(*b*) Exclusion of Radioactive Contamination

The exclusion from 1st April, 1960, of damage to property arising out of radiation or contamination by radioactivity emanating from nuclear

fuel or nuclear waste was introduced simultaneously with the coming into force of the Nuclear Installations (Licensing and Insurance) Act, 1959. The Act makes provision for licensing of all installations capable of emitting ionizing radiations, and makes the licensee of the reactor or other nuclear installation of fuel (whether a Government department, a nationalized industry, or a private owner) under an absolute liability for damage to any property, whether that property is on the site or elsewhere.

The exclusion does not apply to other sources of ionizing radiations such as radioisotopes, X-ray machines, or particle accelerators.

(c) Exclusion of Certain Property

The purpose of this part of the condition is to direct attention to property which has to receive special consideration if it is to be insured. Such consideration may concern underwriting (this applies particularly to the insurance of explosives), may involve the method of settling losses, and in all instances entails investigation into the adjustment of sums insured. The excluded property, apart from explosives, can be divided into two main categories—

1. Where a pre-arranged basis of settlement is advisable, e.g. documents, patterns, or some limitation in amount fixed, e.g. money.
2. Where it is essential that the liability shall be fully recognized and insurance effected, if necessary, e.g. goods in trust.

Documents, patterns, and the like. With the exception of securities (which can include documents such as bearer bonds, certificates and the like for which an indemnity is extremely hard to negotiate because of the difficulty of obtaining satisfactory proof of loss), all the property coming within this category and normally excluded by the policy condition can be covered, subject to certain limitations, thus overriding the exclusion. The cover is given by extending the item covering specified contents to include "All other Contents" and then incorporating this wording.

It is agreed that the term "All other Contents" is understood to include—

(a) Money and Stamps (other than National Insurance Stamps) for an amount not exceeding £..............,

(b) National Insurance Stamps (including any liability for destruction or damage by fire and any other peril hereby insured against established upon the Insured for such stamps affixed to cards), unless more specifically insured, for an amount not exceeding £..............,

(c) Documents, Manuscripts and Business Books but only for the value of the materials as stationery together with the cost of clerical labour expended in writing up and not for the value to the Insured of the information contained therein, for an amount not exceeding £.............. in respect of any one Document, Manuscript or Business Book,

(d) Patterns, Models, Moulds, Plans and Designs, for an amount not exceed-

ing £............... in respect of any one Pattern, Model, Mould, Plan or Design or set of same,

and, so far as the same are not otherwise insured—

(*e*) Employees' Pedal Cycles and other Personal Effects for an amount not exceeding £............... in respect of any one Pedal Cycle and £............... in respect of other Personal Effects of any one Employee.

It will be seen that the basis of settlement for some of this type of property is incorporated into the wording, appropriate limits being inserted. The fact that this extension is freely given probably means that insurers would not refuse to pay for loss or damage occasioned to such property, even in the absence of the extension, provided possibly that sums insured were adequate and there was no evidence to show that the insured specifically intended such property to be excluded.

Employees' effects really come within the category of goods in trust considered in the next paragraph, although, apart from exceptional circumstances, an employer is not legally liable for the property of his employees. Insurers have for many years, however, accepted the fact that an employer may wish to undertake a moral responsibility for the safe custody of his employees' effects, and are prepared to meet claims for damage caused thereto while in the employer's premises, provided provision is made for such effects, as set out above, and the sum insured adjusted accordingly. The insured, in effect, holds the policy proceeds as trustee for the benefit of his employees. The cover applies only if the effects are not otherwise insured, e.g. an insurance taken out by an employee with his own insurer.

Goods in trust. Such goods here refer to those in the possession of the insured in a capacity other than that of ownership, which remains with the person who so entrusts the goods. The owner is known as the bailor and the person entrusted with the goods the bailee. All bailees have an insurable interest and can insure accordingly, but their right to recover under the policy depends upon the extent, if any, of their responsibility to the owner.[1] Such responsibility may arise through—

1. Special contract;
2. Custom of trade (e.g. London granary wharfingers);
3. Statute (e.g. Pawnbrokers Acts, 1872 and 1960);
4. Fire caused by or allowed to spread through the bailee's negligence.

Where goods in trust are specifically insured, it is usual to add the words: "for which the insured is responsible" in order (*a*) to exclude from the insurance any property in respect of which the insured is in no way legally liable as above or (*b*) otherwise to limit his liability, as necessary. Goods held on commission refer to goods held for sale.

When employees' effects were considered it was stated that employers often assume liability for these effects even in the absence of legal

[1]The liability of bailees is further discussed in Chapter 6 (Subrogation).

responsibility. This practice is by no means confined to employees' effects, for many firms now seek to insure the property of their customers against any loss or damage caused by fire or other perils while on their premises. The reason is to retain or gain the goodwill of the customer and so enhance the reputation of the firms concerned; and provided the position is completely understood by both insured and insurer, no valid objection can be raised to such an arrangement. In the event of payment by the insurer, the bailee is then accountable to the bailors for their losses sustained just as he would be if he had been legally responsible (*Waters* v. *Monarch Life Assurance Co.* (1856), 5 E. & B. 870). As will be seen in a later chapter, many of the customers will also be insured and contribution will arise.

CLAIMS

Condition 4. On the happening of any destruction or damage the Insured shall forthwith give notice thereof in writing to the Insurers and shall within thirty days after such destruction or damage or such further time as the Insurers may in writing allow, at his own expense deliver to the Insurers a claim in writing containing as particular an account as may be reasonably practicable of the several articles or portions of property destroyed or damaged and of the amount of destruction or damage thereto respectively, having regard to their value at the time of the destruction or damage, together with details of any other Insurances on any property hereby insured. The Insured shall also give to the Insurers all such proofs and information with respect to the claim as may reasonably be required together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. No claim under this Policy shall be payable unless the terms of this Condition have been complied with.

This condition lays down the procedure to be followed by the insured in the event of destruction or damage to the insured property and is best considered by breaking it down into its component parts.

1. Notice, in writing, must be given to the insurers forthwith (i.e. as soon as practicably possible). Notice to the insurer's agent is deemed sufficient provided it is passed to the insurers.

In practice, notice in writing is not normally made obligatory. Claims are often notified by telephone or personal call and written confirmation is not always insisted on. Insurers naturally like to be advised "forthwith," but are not unreasonable if the claim is small. If the loss is serious, notification is in any event, usually forthcoming quickly. In Glasgow, Liverpool and London, where the tariff offices maintain their own salvage corps, the first notification of loss may come from the corps, who endeavour to find out the insurer or insurers concerned, and thereupon notify them accordingly, thus ensuring speedy attendance by the adjuster appointed to deal with the loss.

The insurer must be given an early opportunity of investigating the cause of the fire and the extent of the loss, and of taking any measures

necessary to minimize or recover his loss, e.g. dealing with salvage, or action against third parties. Apart from these considerations, the absence of a time limit for notification means that the insured can put forward a claim at any time up to six years from the date of loss, or twelve years if the contract is under seal (Limitation Act, 1939).

2. Within thirty days thereafter, or as extended by the insurers in writing, the insured must submit, in writing and at his own expense, as detailed a claim as reasonably practicable.

The insurers may expressly waive the time limit or by their own conduct may cease to be able to rely on the condition. Any articles or items omitted from the claim by ignorance, mistake or oversight can be subsequently submitted, provided the claim has not been settled and that notice be given within the prescribed time. Once an acceptance form (see p. 7) has been signed, no alteration can be made.

3. Such details must describe the property damaged or destroyed and the amount of such destruction or damage, bearing in mind its pre-fire condition and value.

4. Details must be given of any other insurances on the property insured by the policy which is the subject of the claim. (This is necessary, since contribution (Condition 8) may apply.)

5. All proofs and information reasonably required must be given to the insurers. Such information would include, for example, invoices, account books, contractual arrangements with suppliers or customers (e.g. trade discounts) in connexion with contents claims; and plans, estimates, specifications for building claims.

6. If demanded, the insured must give a statutory declaration of the truth of the claim.

Compliance with these terms is a condition precedent to the liability of the insurers *in connexion with any particular claim*. The policy, as such, otherwise remains valid.

Provided, therefore, the insured has done his best to comply with this condition, he has discharged his duty. If the insurer, however, prevents the insured from being able to supply part or the whole of the necessary information, e.g. by taking possession of the property insured, the insured is then discharged from his obligation in this respect.

The condition, as a whole, is largely self-explanatory. Two features only call for particular consideration. The first is the use of the word "reasonably." This word (or the word "reasonable") occurs many times in the conditions, and must be interpreted in its colloquial sense. If there is a difference of opinion as to whether some action or request is reasonable or not, it may be necessary for the matter to be submitted to the court for decision.

The second feature is the reference to a statutory declaration. A

statutory declaration is one made before a Commissioner for Oaths, whereby certain matters are sworn to be true. Such matters might refer, for example, to certain claim details or to evidence of value (if written or corroborated evidence is lacking). The effect of such a declaration is that if, at a later date, it is found that the insured has sworn falsely, the effect is similar to that of committing perjury in a court of law and subjects the individual concerned to criminal prosecution (Statutory Declarations Act, 1835). Although rarely enforced, there are occasions when such a declaration is considered advisable. An example is where the insurer is not satisfied that a claim is genuine in all respects, but where the evidence to repudiate liability is insufficiently strong. A statutory declaration, if given, means that the insurer is able to reopen the claim at a later date if there subsequently comes to hand information which confirms his suspicions. It sometimes happens that a request for a declaration of this kind is refused or ignored, thus suggesting that the insured is unwilling to take the consequences of a possible future court action. The inference is then obvious.

In the event of complete destruction of the subject-matter, including the insured's business records, the production of evidence such as invoices, account books and the like in support of the claim may be impossible. In such circumstances the insurers have to accept such evidence as is *reasonably* practicable for the insured to produce. A statutory declaration may be obtained.

The Law Reform Committee referred to this Condition in their report saying that its presence "is a very valuable protection to the insurers since its function is usually to facilitate prompt investigation after a loss, to ensure control by the insurers of any litigation or negotiations with third parties, or to protect their interest in matters of salvage or subrogation. It is not . . . normally calculated to be prejudicial to an insured who takes the trouble to read his policy . . . ."

The Committee made no recommendation in respect of this Condition.

FRAUD

Condition 5. If the claim be in any respect fraudulent or if any fraudulent means or devices be used by the insured or anyone acting on his behalf to obtain any benefit under this policy, or if any destruction or damage be occasioned by the wilful act or with the connivance of the insured *all* benefit under this policy shall be forfeited.

Although this condition can be divided into three parts, each part concerns fraud, viz.—

1. A claim fraudulent in itself;
2. Fraudulent means used to substantiate a claim;
3. Arson by the insured or by someone acting on his behalf.

Fraud is a very serious offence and the condition does no more than

state the common law. Insurers would never exercise their rights under this condition unless they were absolutely certain of their facts, since the onus of proof is on them, and if the insured chose to challenge their action in a court of law and won the case the insurers could be sued for defamation of character, with possible heavy damages.

A simple example of a fraudulent claim is where the property said to be destroyed or damaged was not on the premises at the time of the loss, or if it was there, that the amount claimed is out of all reasonable proportion to the amount in fact lost. False records or documents may be produced as evidence, in an endeavour to substantiate the claim. The case of *Pell* v. *Hearts of Oak Life and General Assurance Co. Ltd.* (1912) (Unreported) was won by the defendants on the grounds of such fraud.

On the other hand, over-valuation of property lost or damaged for the *purposes of bargaining* does not necessarily constitute fraud. It depends upon the degree of exaggeration. As one learned judge said: "If the plaintiff deliberately introduced into his claim one article which he never possessed or placed upon one he did possess a fraudulent and false value he was not entitled to recover; but merely putting it on after the fashion of claimants, i.e. for what they considered bargaining purposes, whilst ethically indefensible, did not necessarily amount to fraud." It is thus all a matter of degree, and the circumstances of any such suspicious claim have to be investigated with great care. A claim exaggerated through ignorance or mistake is not regarded as fraudulent.

Arson is a felony and includes the action of an insured seeking to damage or destroy his own property with intent to defraud the insurer, or the action of another carrying out the operation on the insured's behalf. Such actions are a felony and are covered by the Malicious Damage Act, 1861, which lays down heavy penalties on conviction. If an insurer suspects fraud on these grounds and knows the insured is being prosecuted, he must await the verdict of the court before deciding whether or not formally to repudiate liability.

REINSTATEMENT

Condition 6. If the insurers elect or become bound to reinstate or replace any property, the insured shall, at his own expense, produce and give to the insurers all such plans, documents, books and information as the insurers may reasonably require. The insurers shall not be bound to reinstate exactly or completely but only as circumstances permit, and in reasonably sufficient manner, and shall not in any case be bound to expend in respect of any one of the items insured more than the sum insured thereon.

The difficulties attaching to reinstatement by the insurers have already been considered in Chapter 4 (p. 64) and this condition sets out the insurers' rights if they do elect to reinstate.

The insurers must exercise their option within a reasonable time, and

they fulfil their obligations if they hand over property substantially the same as before. Although the condition states that the amount expended for any one item will not exceed the sum insured, it is difficult to see how an insurer could hand over an unfinished building merely because the sum insured had been exhausted. If this should happen before completion of the work, grounds for dispute would probably arise, e.g. the question as to whether the money had been judiciously laid out. In any event, the insured would naturally be dissatisfied with an uncompleted building, and it is difficult to conceive an insurer acting in this manner. The point, so far, has not been tested in the courts.

The condition also refers to the insurer becoming "bound" to reinstate. This has reference to the Fires Prevention (Metropolis) Act, 1774, of which two sections only remain unrepealed. In its entirety this Act, and previous ones repealed thereby, set out various regulations dealing with the prevention of fire, and was mainly concerned with building, having been originally passed after the fire of 1666. Most of the building regulations have over the years been incorporated with many changes in the various London Building Acts. The introductory paragraph and that section of the Act pertinent to reinstatement are given hereunder in full—

> GEORGE III. REGIS. An act for the further and better Regulation of Buildings, and Party-walls; and for the more effectually preventing mischiefs by Fire within the Cities of London and Westminster, and the Liberties thereof, and other the Parishes, Precincts, and Places, within the Weekly Bills of Mortality, the Parishes of Saint Mary-le-bon, Paddington, Saint Pancras and Saint Luke of Chelsea, in the County of Middlesex, and for indemnifying, under certain Condition, Builders and other Persons against the Penalties to which they are or may be liable for erecting Buildings within the limits aforesaid contrary to Law.
>
> And, in order to deter and hinder ill-minded Persons from wilfully setting their house or houses, or other Buildings on Fire, with a view of gaining to themselves the Insurance Money, whereby the Lives and Fortunes of many Families may be lost or endangered; be it further enacted by the Authority aforesaid, That—
>
> (1) it shall and may be lawful to and for the respective Governors or Directors of the several Insurance Offices for insuring Houses or other Buildings against Loss by Fire, and they are hereby authorized and required,
>
> (2) *upon the Request of any Person or Persons interested* in or entitled unto any House or Houses, or other Buildings which may hereafter be burnt down, demolished, or damaged by Fire,
>
> (3) *or upon any Grounds of Suspicion* that the Owner or Owners, Occupier or Occupiers, or other Person or Persons who shall have insured such House or Houses or other Buildings, have been guilty *of fraud, or of wilfully setting their House or Houses, or other Buildings, on Fire,*
>
> (4) to cause the Insurance Money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating or repairing, such House or Houses, or other Buildings, so burnt down, demolished, or damaged by Fire;
>
> (5) unless the Party or Parties claiming such Insurance Money shall, within Sixty Days next after his, her, or their Claim is adjusted, give a sufficient

Security to the Governors or Directors of the Insurance Office where such House or Houses, or other Buildings, are insured, that the same Insurance Money shall be laid out and expended as aforesaid;

(6) or unless the said Insurance Money shall be, in that Time settled and disposed of to and amongst all the contending Parties, to the Satisfaction and Approbation of such Governors or Directors of such Insurance Office respectively.[1]

The Act limits the insurers' obligation to expend the proceeds in reinstating only buildings, including houses, and is today normally confined to the second part, i.e. on the request of any person interested in the property insured. Such interested persons include owners, lessors and lessees, mortgagors and mortgagees, tenants from year to year, tenants for life, and remaindermen (those who have an estate after a particular estate is determined).

It is doubtful if any insurer would today consider it a duty to reinstate under the provisions of the Act if fraud were suspected, because of possible repercussions. Things have changed since 1774, when there was a need for such a provision, and if fraud were suspected today other means would be adopted. The insurers could themselves elect to reinstate without giving any reason, or alternatively insist on a statutory declaration. If fraud or arson could be *proved*, the insurer could repudiate liability and the Act would then cease to have any significance.

The wording given above is self-explanatory, but the following additional features are important.

1. Although the Act refers only to "the cities of London and Westminster" and certain parishes nearby, it has been generally held to apply to the whole of England and Wales, but not to Scotland or Ireland.

2. The person entitled to claim reinstatement must make a specific request to the insurer (this is usually done by a solicitor acting for the party concerned). The request need not be in writing, but must be received by the insurer before the claim is paid.

3. The insurer, who alone is authorized to effect reinstatement, is not compelled to expend in reinstatement a greater figure than the sum insured.

4. There must be a valid claim under the policy. Thus the right to claim reinstatement would not apply if liability did not attach because of the breach of a condition.

5. If the insurer fails to reinstate the property on request, the interested party can obtain an injunction restraining him from paying over the money to the insured and may be able to get court authority to compel him to expend the proceeds in reinstatement.

[1]The original Act was phrased in a single paragraph, but it has been set out here in this way to show more clearly the separate features embodied in the paragraph.

Although the Act is still occasionally invoked, the party making the application and the insured named in the policy are usually able to arrange between themselves a method of settlement satisfactory to the insurer.

It is not possible for a person named in the policy to invoke the Act by reason of his contract with the insurer, but if he particularly wanted the money spent in reinstatement he could refuse to endorse the cheque in settlement[1] or the form of discharge. Either way, the money would not be forthcoming (as the bank would not honour the cheque or the insurer would not pay until the form of discharge were completed) and this would enable the particular insured to pursue his line of action.

INSURERS' RIGHTS AFTER A FIRE

Condition 7. On the happening of any destruction or damage in respect of which a claim is or may be made under this Policy, the insurers and every person authorized by the insurers may without thereby incurring any liability and without diminishing the right of the insurers to rely upon any Conditions of this Policy, enter, take or keep possession of the building or premises where the destruction or damage has happened and may take possession of or require to be delivered to them any of the property hereby insured and may keep possession of and deal with such property for all reasonable purposes and in any reasonable manner. This Condition shall be evidence of the leave and licence of the Insured to the Insurers so to do. If the Insured or anyone acting on his behalf shall not comply with the requirements of the Insurers or shall hinder or obstruct the insurers in doing any of the above-mentioned acts then all benefit under this policy shall be forfeited. The Insured shall not in any case be entitled to abandon any property to the insurers whether taken possession of by the insurers or not.

At common law insurers have the right to take all reasonable steps to diminish their loss and to save as much as possible of the property insured. Up to the middle of the nineteenth century both extinguishment and salvage were undertaken by the insurance offices' own firemen and porters, whereas today extinguishment is the responsibility of the local authorities, whose firemen may also undertake certain salvage work. Only in Glasgow, Liverpool, and London do insurers maintain their own salvagemen.

In the exercise of their common law rights insurers have the power to enter the premises insured by them or in which there is insured property, and to remain there for a reasonable time. Similarly, they can take possession of salvaged property and keep it, again for a reasonable time. The minimizing of damage is not the only reason for the insurers' need to enter the property. The right of entry is also necessary to investigate thoroughly the details of the claim and the circumstances of the fire (or damage caused by other insured perils), its possible or probable cause, spread and extent. This condition relative to these

[1] Cheques still require endorsement if two or more payees are named and the payees do not have a joint account.

rights goes further than common law in some respects and is best studied in sections.

The first part refers to the insurers' right to enter the premises and provides, in effect, that in the event of a possible claim under the policy—

(*a*) (i) the insurer (i.e. a member of the office concerned)

or

(ii) any person authorized by the insurer (e.g. an adjuster or salvageman;)

may

(*b*) (i) enter, take or keep possession of the building or premises concerned (ii) take possession of or require to be delivered to them any of the insured property (iii) keep possession of and deal with such property for all reasonable purposes and in any reasonable manner.	without (necessar*ily*) incurring any liability and with the right still to rely on any other condition.

(*c*) This condition shall be evidence of the leave and licence of the insured to the insurer to do so.

The effect of the words following the bracket is to protect the insurers if it is necessary to make a detailed and perhaps lengthy investigation into the claim before deciding whether or not there is any liability under the policy. The *absence* of these words might otherwise estop[1] the insurer from relying on those conditions which are precedent to the right of the insured to recover. That the words are important was illustrated by *Locker and Woolf Ltd.* v. *Western Australian Insurance Co. Ltd.* (1935), 153 L.T. 334, where it was held that taking possession of salvage by the insurer in ignorance of a breach of a condition did not constitute a waiver.

The word "reasonable" is here used again. The best known case in which it had to be decided whether or not insurers had been reasonable was *Ahmedbhoy Habbibhoy* v. *Bombay Fire & Marine Insurance Co.* (1912), 107 L.T. 668, when the verdict was that insurers had retained possession of certain property for an *unreasonable* time and without attempting to minimize the damage, with the result that further damage had been caused. The insurers were accordingly held liable for such further damage. Possession of premises for an unreasonable time could result in the insurers being regarded as trespassers and so liable to the insured for damages (*Cumberland* v. *Albert Insurance Co.* (1866). Ins. Rec. 11th May), or make them liable for consequential loss.

Similarly, the insurers are under considerable obligations if they require to be delivered to them any of the insured property. They are liable for its safety and are responsible for loss in value if it should deteriorate by their unreasonableness while it is in their possession.

As a general rule any steps taken in connexion with damaged property are agreed beforehand with the insured who, provided he consents there-

[1]To bar by one's own act.

to, cannot thereafter claim damages for any action on the part of the insurers leading to further losses not covered by the policy.

The second part of the condition refers to possible hindrance by the insured and is self-explanatory. It merely emphasizes the principle of good faith—

> If the insured or anyone acting on his behalf shall
> (i) not comply with the requirements of the insurer (i.e. as set out in this condition) or
> (ii) hinder or obstruct the insurer in doing any of the above-mentioned acts
> then
> all benefit under this policy shall be forfeited.

The final part deals with abandonment—

> The insured shall not in any case be entitled to abandon any property to the insurers whether taken possession of by the insurers or not.

In marine insurance an insured, in certain circumstances, may give notice of abandonment of property to insurers and claim a total loss although the property insured remains in existence in some form. At common law, however, no such right exists in fire insurance, and the policy clearly sets out the basis to be adopted in settling a claim, namely, value if destroyed, amount of damage if otherwise. Thus, if after a loss there remains some salvage, i.e. property saved from loss, this still belongs to the insured, and if it has any value such value must be taken into account in settling the claim.

Even if the salvage has no value, and a total loss of the sum insured is proved, the insured still cannot abandon the salvage, for it could easily prove a liability to the insurer, e.g. cement wetted in extinguishment or contaminated foodstuffs not even fit for livestock.

In certain circumstances, however, insurers might wish to deal with salvage themselves, and their action could be construed in such a way as to override the common law, particularly if they took possession of the salvage. By the way in which this condition is worded, this has been overcome.

The disposal of or allowance for salvage is as a rule amicably arranged between the two parties, but whatever arrangement is made, the insured can in no circumstances demand that the insurer shall take it over, although its identity with the subject-matter is taken away. Salvage is further considered in Chapter 9 (p. 184).

CONTRIBUTION AND AVERAGE

Condition 8. This is dealt with in Chapter 7 (p. 131).

CHAPTER 6

THE STANDARD POLICY (IV)

THIS chapter deals *inter alia* with one of the most important of the standard policy conditions, namely subrogation. There is an increasing tendency for insurers to exercise their rights against third parties from whom recovery may be forthcoming, and the claims official must therefore be in possession of the knowledge which will enable him to pursue those rights or to prepare his defence if the insured is the third party from whom recovery is sought.

SUBROGATION

Condition 9. Any claimant under this Policy shall at the request and at the expense of the insurers do and concur in doing and permit to be done all such acts and things as may be necessary or reasonably required by the insurers for the purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the insurers shall be or would become entitled or subrogated upon its paying for or making good any destruction or damage under this Policy, whether such acts and things shall be or become necessary or required before or after his indemnification by the insurers.

At common law, subrogation is a legal process arising out of the right of one party, on payment of compensation to another, to avail himself of any rights and remedies possessed by the latter against a third party in connexion with the event which gave rise to the compensation. Subrogation arises with fire and other material damage claims where an insured is entitled to recover his loss wholly or partially from persons other than his insurer. The liability of the others does not prejudice his rights of recovery under his own policy, but once he has been indemnified within the terms and conditions of that policy, he must allow his insurers to take over any rights he may have against the third party who is alleged to be primarily liable for the loss.

Subrogation is thus a corollary of indemnity. The principle of indemnity provides that an insured shall not profit as the result of his property being damaged or destroyed by an insured peril, and if, therefore he decides to claim under his policy then his insurers automatically take over his rights against the third party. The position was clearly set out by Lord Blackburn in 1882 (*Burnand* v. *Rodocanachi* (1882), 7 App. Cas. 333) when he said—

The general rule of law is that where there is a contract of indemnity and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the

> hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.

These words lead back to the earlier explanation of the meaning of subrogation, namely, the right which one person has of standing in the place of another and of availing himself of the rights and remedies of that other. Thus, with the one exception of the Riot (Damages) Act, 1886 (dealt with in Chapter 10), any action taken will be in the name of the insured, since he alone is the person legally in a position to sue the third party responsible for the damage to his (the insured's) property, unless he makes a formal assignment to the insurer of his rights of action, when the insurer can proceed in his own name. The expenses incurred in prosecuting the insured's rights are met initially by the insurer, although some part may be recovered from the defendant if the action is successful.

The subrogation condition therefore basically affirms the common law principle, but changes it in one respect. The common law right of subrogation does not arise until the insured has been indemnified, and the insurer is not entitled to call upon the insured to pursue his rights against third parties before payment of the policy moneys. The last line of the condition, however, requires the insured, if called upon, to take any necessary steps *before*, as well as after, payment. The main reason for this addition is to prevent the insurers' rights being prejudiced by delay, for the longer steps to prosecute inquiries are postponed the less reliable is likely to be any available evidence, particularly in actions involving tort.[1] As a general rule, witnesses are far more likely to tell the truth and give an accurate account of what happened immediately after the event, whereas if the taking of such evidence is postponed the witnesses may have forgotten the facts or be chary of committing themselves. If it can be arranged, therefore, signed statements should be obtained as soon after the event as possible.

The fact that the insurer may require the insured to exercise his rights *before* indemnification does not mean that indemnification can be postponed until the necessary action against the third party has been heard or even commenced. In this respect the common law right holds good, and the insured must be indemnified as soon as the amount due to him has been agreed.

The main points arising out of the enforcement of subrogation rights can be summarized as follows—

1. The insured must sue for the full amount of the loss. So that if he is under-insured he cannot sue merely for his uninsured loss. This was upheld in *Commercial Union Assurance Co.* v. *Lister* (1874), 9 Ch. App. 483, where a mill was severely damaged by an explosion of gas caused

[1] An actionable wrong which is not a breach of contract or a breach of trust.

by the negligence of the Halifax Corporation. The insurances were inadequate to meet the loss and although the insured brought an action for damages against the Corporation, the insurer feared that he would not prosecute his claim for the whole amount because of the burden which so large a sum of money (estimated at £56,000) would place upon the ratepayers, of whom he (the insured) was one. The insurer therefore applied to the court for an injunction to compel him to do so. The court thereupon placed the insured under an undertaking to sue the Corporation for the full amount of the loss, holding that he would be liable for any neglect of his equitable duty towards the insurer.

2. Although there are no legal decisions covering the point, in the absence of any particular terms in the policy, or any special arrangement made between insured and insurer before subrogation rights are exercised by the latter, it would seem that an insured is entitled to be fully indemnified before any rights accrue to the insurer. Thus the insured is not to be deprived of his rights to obtain a full indemnity. If he recovers anything in the action over and above that portion of the loss which falls upon himself, he will hold it as trustee on behalf of the insurer. The position if the loss is reduced by average is not clear. Presumably the insured would sue for the actual loss sustained, i.e. before the application of average, and if successful would refund to the insurer the payment made in settlement by the latter, i.e. after the application of average. The difference would be retained by the insured.

3. If the insured has been fully indemnified and the insurer recovers an amount in excess of that paid under the policy, the surplus is payable to the insured (*Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.* (Unreported).)

4. If after indemnification by his insurer the insured himself proceeds against the third party, i.e. without help from his insurer, he will, if successful, be allowed to deduct any reasonable expenses incurred in so doing when refunding the amount recovered.

5. The insurer may, by the terms upon which he settles the claim, debar himself from afterwards asserting his rights. If, for example, he settles a loss on a compromise basis at the same time surrendering his rights of subrogation, he cannot thereafter assert those rights although subsequent events turn out to the insured's advantage.

6. However strong the insured's rights may be, an insurer cannot take those rights into account when settling the claim initially. The insurer must pay the agreed amount in full (assuming the insured has effected no recovery at that time), thereafter recovering what he can from the third party responsible.

7. As subrogation rights attach only after payment of a claim for which there is legal liability, no such rights attach if an *ex gratia* payment is made unless the insured assigns to the insurer any rights he

may have. Such an assignment might be made by an appropriate note on the acceptance form.

8. The insurer can only take over those rights actually possessed by the insured at the time of the loss. If, therefore, the insured had agreed with another party to waive those rights against such party *before the loss*, the insurer is in no better position than the insured and consequently cannot take any action against the party concerned although the latter is directly responsible for the loss. For example, railway authorities often lease buildings belonging to them, but only provided the lessee agrees to waive all rights against them (i.e. the lessors) including damage caused by the negligence of their servants.

9. The insured is under certain obligations to the insurer. In the event of loss he must—

(i) do all in his power to help him by enforcing his claim in full against the third party. If he refuses, an order may be obtained from the court to compel him to do so.

(ii) do nothing which might prejudice him in any way, e.g. by agreeing some form of compromise or by waiving his rights altogether at the time of or after the loss. If he does so then he is liable to indemnify the insurers for the financial loss so sustained.

10. Refusal on the part of the insured to take any action against the third party can be dealt with in several ways—

Claim not paid. (*a*) The insured can be asked to withdraw his claim or make a formal assignment to the insurer of his right of action.

(*b*) If he refuses, a court order can be obtained as stated in 9 (i) above.

Claim paid. The insurer can obtain a court order as mentioned above, or sue the insured for damages, the measure of such damages probably being based on the sum paid by the insurers.

The subrogation condition is a stipulation, not a condition precedent. A breach has no effect on the initial liability of the insurers, but gives them the right to sue the insured either for fulfilment of the contract or for damages for breach of contract. The insurer is not entitled to withhold payment nor does the mere fact of subrogation rights entitle him to sue the third party in his own name.

11. Recovery of an amount by subrogation does not necessarily have the effect of reinstating the amount of loss originally paid under the policy. (This does not apply to recoveries under the Riot (Damages) Act, 1886, where the Act states that reinstatement of the loss is automatic once payment has been made under its provisions.)

12. Actions founded on tort or contract, including those taken against third parties, are subject to certain limitations of time. These limitations are set out in the Limitation Act, 1939, as amended by the Law Reform

(Limitation of Actions, etc.) Act, 1954, and the position can be summarized as follows—

(*a*) In actions founded on simple contract or on tort or to enforce a recognisance or an award, such actions shall not be brought after the expiration of six years from the date on which the cause of action accrued.

(*b*) In actions for damages for negligence, nuisance, or breach of duty (whether the duty exists by virtue of a contract, or of provision made by or under a statute, or independently of any contract or any such provision), where the damages claimed by the plaintiff *include damages in respect of personal injuries*, the limitation period is *three years*. This part also applies to Scotland.

These provisions apply generally to ordinary citizens, public authorities, nationalized industries and the Crown (the last subject to any special enactments).

13. *Law Reform (Miscellaneous Provisions) Act*, 1934 (as amended by the Law Reform (Limitation of Actions, etc.) Act, 1954). On the death of any person, all causes of action subsisting against or vested in him shall survive against or for the benefit of his estate. In actions involving tort *against* the estate of a deceased person, no proceedings shall be maintainable unless—

(*a*) they were pending at the date of death or

(*b*) proceedings are taken not later than six months after his personal representatives took out representation.

The Act does not apply to Scotland or to Northern Ireland, but the latter territory is covered by a similarly-worded Act: the Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1937.

14. *Third Parties (Rights against Insurers) Act*, 1930. This Act concerns those cases where a policy of insurance is in existence indemnifying the person upon whom it is alleged that liability rests. Briefly, the Act provides that where a person or firm is insured under a third party policy and liability is incurred either before or after the policyholder has become bankrupt or has made a composition or arrangement with his creditors (or if a company, in the event of a winding-up order being made), then his (i.e. the third party's) rights against his insurer in respect of the liability incurred, are transferred to the party claiming compensation, who is then in a position to make a claim against the third party's insurer direct. Before this Act, any payment could have been made only to the third party as policyholder, and would then be included with any other assets for distribution, the party entitled to compensation ranking *pari passu* as a creditor against the estate.

Not only the rights of the insured, but also his obligations are in such circumstances transferred to the party claiming compensation, who is bound by the terms and conditions of the policy.

Indemnification Aliunde. If the loss sustained by the insured is partially or wholly made good from some other source, either before or after indemnification by the insurer and without any legal action on the latter's part, the insurer's liability becomes correspondingly diminished or extinguished. Compensation so received by the insured is known as indemnification *aliunde* (i.e. from another source). Such compensation must have the effect and intent of benefiting the insured, and if this is so the insurers likewise must have the benefit thereof.

For example, the insured may receive a sum of money (or some other benefit) voluntarily made—

(*a*) by the person legally responsible for the loss or damage;

(*b*) by the person causing the loss or damage although under no legal liability, i.e. as an act of grace;

(*c*) by a third person as a gift.

Under (*b*) and (*c*) the insurer must not have been excluded by the donor from the benefit of the payment.

Since the insured is entitled to an indemnity, the insurer is liable for any balance of loss not met by the payment aliunde.

The value of any salvage may also constitute indemnification *aliunde* as the insured is entitled only to payment of the loss less the value of such salvage.

RIGHTS OF SUBROGATION

The principal ways in which insurers may be entitled to subrogation rights are as follows—

1. Rights arising out of tort.
2. Rights arising out of contract.
3. Rights under statute.
4. Rights over the subject-matter.

1. Rights Arising out of Tort

In everyday life it is the accepted rule that people will so conduct themselves as to cause neither injury to other persons nor damage to their property. Such injury or damage may be unavoidable, but if caused wilfully, by negligence, or by nuisance, then the injured party has a right of action for damages against the offending party, known as the tortfeasor or wrongdoer.

NEGLIGENCE

Negligence has been defined as the failure to observe that care and circumspection which are due from one man to another (*Pollock on Torts*) or the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or his doing something which a pru-

dent and reasonable man would not do (*Blyth* v. *Birmingham Water Works Co.* (1856), 11 Exch. 781. The implication in a charge of negligence is failure or omission to perform a positive duty—the duty, namely, to exercise care not to cause injury or damage to another.

Where subrogation rights arise out of tort the rights are usually based on negligence, the onus of proof resting on the person alleging it.

It is necessary to adduce proof that damage has been caused by someone's negligence, and it has been said that to prove negligence it is necessary for the plaintiff to establish by evidence circumstances from which it may be inferred that there is *reasonable probability* that the fire (or other peril) resulted from the want of some precaution which the defendant might and ought to have resorted to. The plaintiff, therefore, has to establish a reasonable probability, and if he can do so, then he will succeed in his action.

The first step taken by an insurer who thinks that the insured has a good chance of recovery is to acquaint the tortfeasor of the intention to proceed against him. Negligence may be admitted or denied, but in either event the offending party may himself be insured against liability to third parties, and, if so, will usually divulge the name of his own insurer. The two insurers concerned will then consult, the result depending on the relative strength of the two sides. If negligence is admitted or proved, the insurer exercising his rights will demand a full recovery. If it is not, the result may vary from a complete denial of negligence with no payment of any kind to some form of compromise, recovery being agreed at, say, 50 per cent or some other percentage of the loss. If negligence is denied and payment of any kind refused by the offending party's insurer, the other insurer has to consider the evidence and decide if it appears to be sufficiently strong to continue to press the claim for recovery, and to take the matter to court, if necessary.

Some insurers have agreements whereby claims, usually up to a specified limit, arising out of negligence or nuisance (see later) are shared between the fire and third party policies in a fixed proportion, thus obviating proceedings which may often be protracted and sometimes expensive. Such agreements are by no means universal, however, and many insurers prefer to retain a free hand in such matters.

If the tortfeasor is not insured or only partly insured (i.e. he is insured for a sum less than the amount claimed) any action will usually depend on his financial strength. If he is a man or firm of small means, insurers are reluctant to take proceedings knowing that, even if they succeed, the amount recovered may be small. In addition, the result of their action could well make the tortfeasor bankrupt, a situation they would not care to envisage.

An outline of the legal proceedings involved in pursuing subrogation rights generally is given later (see p. 114).

Nuisance

Nuisance implies encroachment by one person on the natural rights of another, or interference with his enjoyment of those rights. Nuisance arises from the use of land, and in Lord Halsbury's *Laws of England* (Nuisance) Vol. 28, is said to constitute, *inter alia*

> acts or omissions generally, but not always or necessarily, connected with the user or occupation of land which cause damage to another person in connexion with the latter's use of land or interference with the enjoyment of land or of some right connected with the land.

If then, for example, an occupier of premises uses them in such a manner as to interfere with his neighbour's use and enjoyment of his own premises, that constitutes an actionable nuisance. Thus, where a person stores inflammable or explosive material near his neighbour's property, or near the public highway, or if he carries on blasting operations in the vicinity of his neighbour's property or of the public highway, he is answerable as for an act of nuisance if, as a result of such proceedings, mischief should be occasioned to his neighbour.

Once it is established that damage has been caused by nuisance, it is no defence that reasonable care was taken to prevent such damage. Negligence does not have to be proved.

Spicer and Another v. *Smee*, [1946] 1 All E.R. 489, was a case of nuisance. Spicer owned a bungalow adjoining one belonging to Smee, who, in 1934, had had electric lighting installed by an independent contractor. In 1942 a fire broke out in the defendant's bungalow and it spread to and seriously damaged that belonging to the plaintiff. It was established that the fire was caused by the inadequate insulation of part of the wiring (through the negligence of the contractor) and judgment was given for the plaintiff on the grounds that the bare wire constituted a nuisance, of which the defendant should have been aware. The defendant could not escape liability although the nuisance had been created by an independent contractor.[1]

According to Welford and Otter-Barry (*Law of Fire Insurance*, fourth edition), although somewhat similar in effect to nuisance, "the rule relating to the escape of dangerous things as laid down in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, is of different origin and legal character." The rule is to the effect that if any one keeps on his land something which is inherently dangerous, that is to say, something which if it escapes is likely to cause damage, he must keep it at his peril and under his control. If he so fails to do and damage is occasioned to a third party's property or person, the party responsible is under strict liability to make good such damage or injury. Once the plaintiff satisfies the court of the cause of the outbreak, he is entitled to recover irrespective of negligence.

[1]This feature is further dealt with on p. 94.

The case of *Rylands* v. *Fletcher* dealt with liability for damage to property caused by the bursting of a reservoir, and during the trial it was said—

> Where the owner of land [this would include buildings] without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything that would not naturally come upon it, and which is itself dangerous and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned.

For liability to exist under this rule, therefore, two conditions have to be specified—

(*a*) Non-natural user of the land;

(*b*) Escape of the thing or things causing the damage.

Thus the rule in *Rylands* v. *Fletcher* does not apply to things naturally on the land, e.g. rocks, noxious weeds, vermin, and water, when they have not been brought there.

As stated earlier, in the case which properly falls under the rule in *Rylands* v. *Fletcher* it is unnecessary to prove negligence, and it is no defence for the defendant to say that he has taken all possible precautions to prevent damage. The development of the rule over the years has led to a re-definition of the principle, which is expressed in *Clerk & Lindsell on Torts* (11th edition, p. 621) as:

> A person who owns or controls anything inherently dangerous, which is likely to do damage if it escapes from his land, does so at his peril and is liable for all the consequences of its escape, without any proof of negligence on his part, even if he did not know it to be dangerous.

There are, however, certain recognized exceptions to the rule and these include: Act of God, act or default of the plaintiff, consent of the plaintiff, independent act of a third party, and statutory authority without negligence. Moreover, the rule does not apply to natural user of land, and cannot apply where there has been no "escape" from the defendant's land (*Read* v. *J. Lyons & Co. Ltd.* (1947), A.C. 156).

Blowlamps or similar apparatus are not regarded as inherently dangerous in themselves, but if used in certain conditions, e.g. in proximity to highly combustible materials, their use can be regarded as a dangerous practice, and if damage results then, pursuant to *Rylands* v. *Fletcher*, there is liability without proof of negligence in the manner in which the apparatus is handled.

The use of a blowlamp in dangerous circumstances was illustrated in *Balfour* v. *Barty-King and Another*, [1957] 1 All E.R. 156, C.A. This case concerned a mansion converted into four houses. The plaintiff owned one of these and the first-named defendant another. During severe weather a pipe became frozen in the loft of the house of the said defend-

ants, who called in an employee of a builders' firm working nearby to unfreeze it. The employee used a blowlamp which set fire to some lagging, the fire ultimately spreading to and causing severe damage to the adjoining house owned by the plaintiff. The defendants were held liable because the use of the blowlamp was in the circumstances dangerous and a non-natural use of the premises; hence the rule in *Rylands* v. *Fletcher* applied. A particularly interesting feature of this case was the fact that the defendant was held liable for the actions of the employee concerned, who became his servant during the period of his service (that is, there was vicarious liability). An owner of property is liable for the spread of fire in the circumstances outlined, not only if caused by himself but also if occasioned by his servants (provided they are acting within the scope of their employment), guests, friends, or independent contractors. Only the acts of a complete stranger or trespasser give relief from liability. In the case mentioned the defendants themselves, in turn, had a right of recovery against the firm of builders.

The Fires Prevention (Metropolis) Act, 1774

Sect. 86 of the Fires Prevention (Metropolis) Act, 1774, states that—

> No action, suit or Process whatever, shall be had, maintained or prosecuted against any person in whose House, Chamber, Stable, Barn or other Building, or on whose Estate any fire shall . . . accidentally begin; nor shall any Recompense be made by such Person for any Damage suffered thereby; any Law, Usage, or Custom, to the Contrary notwithstanding.

Before the passing of an earlier Act (repealed by the 1774 Act) it is thought that probably any person was liable at common law for the mere escape of fire however caused and was bound to make good any loss so arising. This Act, therefore, modified such liability by relieving a person from the consequences of an *accidental* fire.[1] The Act, however, still affords no protection where the fire is (1) deliberately started, (2) occasioned by negligence or if, having originated accidentally, it is *continued* by negligence, (3) occasioned by nuisance, or (4) where the rule of *Rylands* v. *Fletcher* applies.

Railway and Other Engines

Railways expressly empowered by statute to operate locomotives are, with certain exceptions, exempt from liability for the consequences of any fire occasioned by the escape of sparks, cinders, or other burning matter. These exceptions, and the modification of the exemption from liability as laid down by the Railway Fires Acts, 1905 and 1923 are dealt with on pp. 109–11.

[1]In Scotland the same effect is produced by the operation of *damnum fatale* or inevitable accident, i.e. something the occurence of which no amount of care could have prevented.

If damage is caused by the escape of sparks from a locomotive used in accordance with a statute which does not expressly authorize its use (notwithstanding the fact that the undertaking concerned is empowered to make and work the railway) the liability is strict (*Jones* v. *Festiniog Railway Co.* (1868), L.R. 3 Q.B. 733).

In *Powell* v. *Fall* (1880), 5 Q.B.D. 597, it was held that the operators of a traction engine on a public highway were liable in damages for the destruction of a haystack caused by sparks emitted from the smoke stack of the engine, notwithstanding that there was no proof of negligence.

Where property is said to have been damaged by sparks from an engine travelling on a public thoroughfare, before recovery is possible it must be proved—

(i) that sparks came from the engine, some of which were seen to fall on the property concerned; if such property were naturally inflammable, e.g. farm produce such as straw, or thatched buildings, the evidence would be prima facie; or

(ii) that the engine passed near the property concerned and that all the evidence produced indicated that its presence caused the damage; thus a *reasonable probability* might suffice, but all would depend on the circumstances and evidence available.

If traction engines or, as is common now, tractors or other mechanical engines, are taken into premises by invitation, e.g. for threshing, timber felling or sawing, the invitor must accept their presence and the fact that they can cause fires by reason of their nature. If, therefore, damage is occasioned to the invitor's property by their use, no liability attaches to the owners or operators of such engines, in the absence of negligence.

Negligence and nuisance are sometimes confused, but there is a difference. In the *The Dictionary of English Law* (Earl Jowitt) Vol. 2, it is stated that—

> Nuisance may be distinguished from negligence in that nuisance is an act or omission causing injury, the injury itself giving rise to an action for damages, while a person suffering from damage due to negligence must prove that the damage was caused by some want of care, according to the degree which was required in the particular circumstances of the case.

Actions arising out of tort, so far as fires are concerned can, for purposes of consideration, be divided into three categories.

(i) Property damaged by fire caused by the action of persons present or working on the premises of others.

(ii) Property situated on the premises of another and damaged by fire originating thereon.

(iii) Property damaged by the spreading of fire originating from other premises.

1. Property Damaged by Fire Caused by the Action of Persons Present or Working on the Premises of Others

Into this category fall the majority of actions arising out of tort. Builders and contractors of all kinds are frequently involved in such actions (most of which are settled out of court) and the most common cause of such negligent fires is probably the use of blowlamps for burning off old paint before repainting. As mentioned earlier, blowlamps or similar plant, e.g. oxy-acetylene welding or cutting apparatus, are not considered dangerous instruments in themselves, but if fires arise during their manipulation the inference is that they have not been used with sufficient skill or care and that there has probably been some negligence on the part of the operator. In other words, failure to *prevent* damage in such circumstances may be sufficient to constitute prima facie evidence of negligence. Thus the onus of proof on the plaintiff is not onerous, once it is established how the fire broke out.

This principle was illustrated in *Ellerman Lines Ltd.* v. *H. & G. Grayson Ltd.*, [1919] 2 K.B. 514, where red hot rivets fell into the hold of a ship, there igniting jute. No hatch covers had been provided, and it was held that the defendants had failed in their duty to prevent damage by not insisting that the hatch covers were in position beforc commencing operations.

Some everyday examples where negligence has been admitted without reference to the courts are—

1. The ignition by a blowlamp of birds' nests under the eaves of a house. It was held that nests in such a position are common and the operator should have made a thorough investigation in this respect before commencing work.

2. The ignition of curtains by a blowlamp used near a partly-open window. It was successfully contended that the operator should have seen that the window was shut while the blowlamp was being used.

3. The ignition by a spark of combustible material situated underneath a roof where oxy-acetylene cutting was being carried out. It was successfully alleged that the material should either have been covered up or removed to a place of safety and that the operators of the plant should not have commenced work before this had been done.

On the other hand, it was held that a blowlamp was not used negligently although fire subsequently broke out because the operator was able to explain that the woodwork was sound, as far as he could reasonably ascertain, whereas in many places it was rotten underneath. The operator, as he was able to prove, had used all necessary care in carrying out his work and could not reasonably be charged with negligence (*Culbert* v. *Millar* (1926), Sheriff Court, Airdrie (Unreported).)

Cases involving negligence include the following—

Waring & Gillow *v.* Doughty
The Times, 21st Feb., 1922

The plaintiffs had charge of the defendant's mansion for the purpose of carrying out decorative work. A fire occurred which it was held originated in a bedroom where the contractors' men had lit a fire. Plaintiffs claimed £4,000, the amount of their account, and the defendant counterclaimed £25,000 in respect of the damage to the mansion for which he held the contractors responsible. It was established that the fire was caused by the ignition of timbers forming part of the fireplace, and, on appeal, it was held that the plaintiffs were liable because the man they deputed to examine the bedroom did so in a wholly insufficient manner, i.e. the fire was due to want of care.

Higham *v.* Stevens
(1930) (*Policy Holder* — Law Supplement, 26th March, 1930)

The defendants were held liable for the damage caused by a blowlamp used by their employees when repairing a lift, the flame coming into contact with some waste in the lift well.

Musgrove *v.* Pandelis
[1919] 2 K.B. 43, C.A.

The defendant was allowed the use of the plaintiff's garage to house his car. The defendant's chauffeur started up the car engine, when a flame shot up from the carburettor. The chauffeur omitted to do what a prudent person ought to have done, to shut off the flow of petrol, with the result that the fire spread throughout the car, and ultimately involved the whole garage and its contents. The defendant was held liable for the damage caused.

If work done by one party for another is made the subject of a contract, oral or written, drawn up between the parties concerned, the terms of such contract must be ascertained to see if they have any bearing on liability. (This is considered under (2) Rights arising out of contract.)

2. Property Situated on the Premises of Another and Damaged by Fire Originating thereon

This category mainly concerns the liability of the bailee who is legally responsible for the safe custody or control of property in his possession. The duty laid upon a bailee by the common law is generally to exercise that degree of diligence in the safe custody of the goods entrusted to him which men of common prudence exercise about their own affairs.[1] If he fails to observe that duty, i.e. he fails to exercise the standard of care required having regard to all the circumstances, and, as a result, involves the bailor in a loss, he will be liable as for an act of

[1]Bailment can be either gratuitous or for reward. While the same considerations of care apply, it has been said that a gratuitous bailee owes a duty to take such care of an article as a reasonable man would take of his own articles, whereas a bailee for reward should take the rather greater care that a reasonable man would take of other people's articles lent to him at his request for his convenience.

negligence. (The liability of hotel proprietors as innkeepers and common carriers is different from that of the ordinary bailee and is considered later under (3) Rights under Statute.

When property entrusted to a bailee is damaged or destroyed and it is thought that this was due to the negligence of the bailee or his servants, the onus of proof of negligence lies on the plaintiff. If he succeeds, it is then incumbent on the defendant—

1. To disprove negligence; or
2. If unable to do this, to prove that his negligence did not result in the damage to the property in his possession.

A bailee is not liable for the consequences of accidental fire. He is protected by the Fires Prevention (Metropolis) Act, 1774, (see p. 80) although there is no onus on his part to prove that the fire *was* in fact accidental so long as he can prove he was not negligent or, if he was, that such negligence was not the cause of the fire. This was made clear in *Williams* v. *Owen*, [1955] 1 W.L.R. 1293, when the judge said: "I do not think it incumbent on the defendant to prove *how* the fire happened."

To sum up, therefore, it seems that the plaintiff in any action of this kind must prove negligence on the part of the defendant, and if he does so, the latter cannot then plead the protection of the 1774 Act. The onus then passes to the defendant to prove that, notwithstanding the evidence put forward by the plaintiff, he was not negligent, or if he was, that such negligence was not the cause of the fire. If he cannot do this, then he will fail. Only a *reasonable probability* of negligence need be established by the plaintiff, not necessarily a certainty.

3. Property Damaged by the Spreading of Fire Originating from Other Premises

The expression "other premises" refers to another part or other parts of the same building, but in different tenure, or to adjoining or nearby buildings also in different tenure. Thus the spread of fire could be from one part of a building to another part of the same building occupied by a different tenant or from one building to another. The expression also includes any yards or open ground forming part of the premises.

The legal position here is in many ways similar to that considered under the previous heading. The plaintiff must establish that the fire was either originally caused or continued by negligence or nuisance and, if he can do so, the defendant is liable in damages.

Examples of possible negligence in relation to spreading fires are as follows—

1. The use of blowlamps, oxy-acetylene cutters or welders and similar apparatus starting fires which then spread elsewhere.

recover although the defendant himself had been proved guilty of negligence. But it is not easy to prove that a plaintiff is guilty of contributory negligence, for it is generally accepted that the onus is on the party carrying out the work to apprehend the danger of using any particular apparatus and to act accordingly. With the passing of the Act, however—

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimants' share of the responsibility for the damage.

The Act does not operate to defeat any defence arising under a contract. The Act applies to Scotland, but not to Northern Ireland.

Crown Proceedings Act, 1947

By virtue of this Act, which also applies to Scotland, servants or agents of Government departments (excluding members of the Armed Forces on duty and some members of the Post Office Service in certain circumstances) are placed in the same position as ordinary members of the public so far as the law of torts is concerned. Thus such Government departments may be sued for damages in respect of negligence or nuisance or breach of various duties and can sue others for similar reasons. There are certain minor differences between some of the provisions of the Act and those applying at common law.

2. Rights Arising out of Contract

The liability of a defendant third party for loss by fire may depend on the terms of a contract, expressed or implied, whereby he is liable to compensate the plaintiff for the loss.

Bailor and Bailee

Although a bailee, in the ordinary way, is under a duty merely to take reasonable care of property entrusted to him, and therefore cannot be held liable for damage to such property in the absence of negligence or nuisance, he may have contracted with the bailor to be responsible for its safety. If such a responsibility has been undertaken then, according to the terms and conditions of the contract, he will be liable for loss irrespective of negligence. Launderers are an example of such bailees. They normally accept liability for loss or damage by fire for an amount not exceeding twenty times the washing or cleaning charge for the article or articles concerned.

A bailee is also liable to the bailor for loss if he has been guilty of

disobedience of the bailor's specific instructions, but for which the loss would not have happened.

In the absence of a contractual liability most bailees are exempt from liability for loss by accidental fire to property entrusted to them with the exception of

(*a*) Common Carriers,
(*b*) Pawnbrokers,

which are considered under Rights under Statute (see p. 109).

It is possible for a bailee to contract out of his common law liability for negligence provided two essentials are fulfilled. They are—

(i) that the attention of the bailor has been drawn to the disclaimer and he accepts it; this includes a notice disclaiming liability in such a position that the bailor should not fail to see it and again accepts it or takes no steps to refuse it, and

(ii) that the disclaimer itself is adequately worded.

For example, a notice worded as follows, permanently and prominently displayed and accompanied by a similar notice on any ticket issued by the proprietors would probably constitute a valid disclaimer—

> Property is left here on condition that (*the name of the bailee*) shall not be liable for loss of or damage to such property howsoever or whensoever such loss or damage may be caused.

A mere notice or statement to the effect that "goods are left at owners' risk" would not necessarily constitute a disclaimer. It would all depend upon the particular circumstances.

The courts do not favour the inclusion of exemption clauses in contracts whereby normal common law liabilities are excluded, and the following are some of the arguments which may be put forward in an endeavour to prove that a defendant has not effectively contracted out of his ordinary responsibilities—

(i) The exemption clause was never incorporated into the contract.

(ii) The clause may not be enforceable because agreement to it was obtained by fraud or misrepresentation.

(iii) The clause may be interpreted so strictly that it does not cover the particular circumstances.

(iv) The contracting out may be barred by some statutory provision.

(v) There may have been failure on the part of the bailee to fulfil the terms of the contract.

Builders and Contractors

Liability varies according to the terms and conditions of the contract, but many contracts nowadays are based on special forms of contract drawn up by (*a*) the Royal Institute of British Architects, or (*b*) the Institution of Civil Engineers.

Under Condition 15(*b*) (B) (which applies to existing buildings being altered or extended) of the R.I.B.A. form of contract "The existing structures together with the contents thereof and all unfixed materials and goods (except plant, tools, and equipment) *shall be at the sole risk of the Employers as regards loss or damage by fire . . .*" and it was held in *Archdale (James) & Co. Ltd.* v. *Comservices Ltd.*, [1954] 1 W.L.R. 459, that this condition relieves the contractor from liability in respect of any fire damage to the property concerned, even though caused by his negligence. As regards new buildings, the contractor is obliged to insure the works against fire damage in the joint names of himself and the employer.

Under the I.C.E. form of contract, the contractor is generally made responsible for insuring the contract works in the joint names of himself and the employer.

In Scotland, the position is covered by "Regulations and General Conditions for Building Works in Scotland—1st September, 1954." By these Conditions the contractor is made liable for all damage to adjoining property including that of the employer if caused by negligence, omission or default of himself, his servants or sub-contractors. The contract works themselves have to be insured in the joint names of contractor and employer. Fire damage to works executed is at the sole risk of the employer.

Lessor and Lessee (Landlord and Tenant)

(*a*) *Buildings*

Where property is leased or rented the liability to repair or rebuild depends on whether or not there is in existence a lease and if so, the terms, if any, of that lease relative to damage by fire. The following situations arise.

(i) *No lease.* A lessee is not liable for the consequences of accidental fire. The loss, therefore, falls on the landlord, whose insurers have no right of subrogation against the lessee.

(ii) *Lease making no reference to maintenance or repair.* In these circumstances the lessee is not liable for the consequences of accidental fire.

(iii) *Lease containing covenant by lessee to repair and maintain property.* The lessee is liable for fire damage *unless* there is specific exemption from liability for fire damage. (Many leases include the words "damage . . . by fire excepted".)

The case of *Darrell* v. *Tibbitts* (1880), 5 Q.B.D. 560, came under this heading. Tibbitts was the lessee of a house, the lease containing a covenant to repair. The house was damaged by an explosion of gas for which the Brighton Corporation were held responsible, and the money

received from the Corporation was expended in making good the damage. The lessor also claimed against his insurer, but during the negotiations sold the house to Tibbitts to whom the lessor's policy was transferred. The insurer, being ignorant of the fact that the lessee (now the owner) had already been indemnified by the Brighton Corporation also met the claim, but took action afterwards to recover the amount paid. The case was won on appeal. The relevant consideration here is that the original owner, having had his property repaired, should not have claimed against his insurer.

A covenant whereby a lessee has to insure the property is often included in a lease, and failure so to insure would lay the lessee open to an action in damages for breach of that covenant, the measure of damages in the event of damage by fire being the loss sustained by the lessor.

In all cases where the lessee is made responsible for repairs (including those necessitated by fire) his liability is not limited to any particular amount although a specific figure is named in the lease. If this figure in the event of loss is insufficient to repair or reinstate the property, the lessee is still liable to the lessor for the balance (*Digby* v. *Atkinson* (1815), 4 Camp. 275).

(iv) *As in* (iii) *but covenant by lessor*. The landlord is liable to make good all damage by fire.

Under (iii) and (iv) above, the question arises as to the position of the lessee in the event of negligence on his part. If the lease makes the lessee liable for repairs, "damage by fire excepted," the exception applies only to fires accidentally caused, and liability would therefore attach to the lessee for negligence. If, however, the landlord covenants to insure, and debits the lessee with the premium, the inference is that the proceeds of the policy are for the benefit of the lessee and in such an event the proving of negligence on the part of the tenant would probably not override such benefit.

(*b*) *Rent*

A tenant remains liable to pay rent although the property be destroyed or rendered uninhabitable unless the lease contains a special provision (known as a cesser of rent clause) which exempts him from such payment until the premises are rebuilt or put into habitable condition again.[1]

Subrogation may arise in insurances on both building and rent because in each instance outlined above primary liability rests on one party, either lessor or lessee (or landlord or tenant) according to the particular circumstances. If, therefore, the other party (i.e. the party *not* primarily liable) has also insured the property or the rent for his own

[1]In Scotland payment of rent automatically ceases once premises are rendered uninhabitable.

protection *his* insurers, in the event of loss, will have subrogated rights against the party primarily liable.

VENDOR AND PURCHASER

(*a*) *Buildings*

Immediately a contract to purchase is signed, i.e. made binding, the purchaser becomes the owner in equity, and the property is at his risk. If, therefore, it is damaged or destroyed before conveyance or completion of the sale, he is still liable for the full purchase price without any deduction. The obligation on the purchaser to pay the full purchase price notwithstanding the fact that the property may be damaged before conveyance was the reason for the action of *Castellain* v. *Preston*, details of which are given on p. 43. Before 1925 the vendor's insurers, if they had met their insured's loss, would have had rights against the purchaser, but the position is now governed by the Law of Property Act, 1925 (which *applies to all property*), in which it is enacted that any insurance moneys received by the vendor after the contract has been signed shall be held in trust for the purchaser and paid to him on completion provided—

(i) the consent of the vendor's insurers has been obtained, i.e. the purchaser's interest provisionally noted and (ii) the purchaser pays a proportionate part of the premium from the date of the signing of the contract of sale to the expiry date of the current policy. (As will be seen later, notification of the contracting purchaser's interest is no longer essential as the position is covered by a policy condition, No. 13, although in practice many solicitors still notify contracts to purchase properties to the relative insurers.)

Although the vendor is now obliged to hold in trust for the purchaser any policy moneys received, the purchaser is still liable for the agreed full purchase price. In practice, however, the final settlement as between vendor and purchaser is normally arranged on a net basis through the medium of solicitors.

(*b*) *Goods*

Any transfer of goods from one party to another in return for a monetary consideration constitutes a contract of sale, the goods being at the risk of the seller until the property passes to the buyer.

The purchase and sale of goods is governed by the Sale of Goods Act, 1893, and one part of this Act deals with the time at which the property passes from one party to another. This "time" is important, for as soon as the property passes to the buyer he is liable for the purchase price although the goods may not have been taken away. If such goods are damaged or destroyed by accidental fire while still on the seller's premises, the purchaser must complete the contract by paying the purchase price. If, therefore, the seller has insured the goods (he

has an insurable interest as unpaid vendor) and the loss has been met by his insurers, the latter have rights of subrogation against the purchaser who is primarily liable, because he is legally bound to pay the seller the agreed price notwithstanding the fact that the goods have been damaged or destroyed before he took delivery of them.

The rules set out in Sect. 18 of the Act dealing with the time at which the property passes to the buyer can be summarized as follows, although they can be modified by special agreement or by custom of trade.

Nature of goods	*Property passes to buyer*	*Example*
Specific goods ready to be delivered.	Immediately contract is made.	Sale of a particular table which is earmarked for the buyer.
Specific goods which need something done to them before they are ready for delivery.	When the necessary work has been done and the buyer so notified.	Sale of a particular table which has to be polished before buyer will accept it.
Specific goods which have to be weighed or measured in some way to ascertain the selling price.	When the weighing or measuring is done and the buyer so notified.	Sale of a roll of cloth at so much a yard where the exact length of material in the roll is not known.
Goods on sale or return.	When the buyer signifies his approval or keeps them for an unreasonable time.	—
Future goods sold by description.	When such goods become available, are in a fit state for delivery, and are appropriated to the contract by either party with the consent of the other.	—

With specific goods at an auction, the property passes to the buyer immediately the hammer falls.

Other relevant parts of the Act include the following—

(*a*) If anyone sells specific articles in ignorance of the fact that they have been destroyed, the contract is void.

(*b*) If after the agreement is made but *before* the property has passed, specific goods perish without fault on the part of either buyer or seller, the agreement is avoided.

(*c*) If delivery is delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.

(*d*) A contract for the sale of unascertained goods is not void if goods held by the seller are, for example, destroyed by fire. He must replace the goods or pay damages for breach of contract.

(*e*) Nothing in the Act is held to affect the duties or liabilities of

either seller or buyer as a bailee or custodian of the goods of the other party. If, therefore, the seller retains the goods as bailee, liability can still be imposed on him for loss or damage caused by negligence or arising from custom of trade.

Apart from possible subrogation rights, the Act is important because it defines the ownership of goods which are the subject of a contract of sale, the insurable interest in the goods resting with either buyer or seller according to the passing of the property.

In the sale of goods generally, the purchaser assumes that the goods he buys are what they are made out to be (Sect. 14, Sale of Goods Act, 1893). If, therefore, they include articles which do not conform to the correct description of the goods, as a result of which damage or injury is caused, the injured party has a right of action against the seller. The most common example is the explosion of "coal" in grates, or boilers, caused by explosives (used in coal mines) becoming mixed with the coal. The right of action is against the supplier of the coal, i.e. the coal merchants (*Wilson* v. *Rickett Cockerell & Co. Ltd.*, [1954] 1 Q.B. 598, who have a similar right against the National Coal Board.

MORTGAGOR AND MORTGAGEE

A mortgage is merely a loan upon security and the fact that the security is destroyed or damaged by fire does not release the mortgagor from his obligation to repay the loan. Thus, at common law, if the mortgagee insures the property himself and following damage by fire recovers a full indemnity from his insurer, the latter would have subrogation rights against the mortgagor for the balance of the loan outstanding.

Although the insurance of mortgaged property may be effected in various ways, e.g.—

(*a*) by the mortgagor under the covenant in the mortgage deed;

(*b*) by the mortgagor voluntarily (i.e. the deed contains no such covenant);

(*c*) by the mortgagee under the Law of Property Act, 1925;

the position as regards subrogation is not affected. If the insurance is effected by the mortgagor under the mortgage deed, the mortgagee, if he so requires, can insist that the policy moneys be spent either (*a*) in reinstatement or repair or (*b*) in or towards discharge of the loan. (Law of Property Act, 1925). If the insurance is effected by the mortgagor voluntarily the mortgagee can, if desired, invoke the Fires Prevention (Metropolis) Act, 1774. Few of these features arise today because most policies are effected in the joint names of mortgagor and mortgagee.

Rights arising by custom of trade. In certain trades, e.g. granary wharfingers, bleachers, printers,[1] and dyers, it has become the custom

over the years for the traders concerned to accept responsibility for loss of or damage to some property by certain perils, including fire, while such property is in their custody. As a general rule, such custom or usage is well known and liability accepted accordingly, but if there is any doubt, proof of custom of any particular trade has to be determined by the courts. In the event of loss or damage to property so entrusted, primary liability rests on the trader (or bailee) concerned, and an insurer who has indemnified the owner of such property is able to exercise his subrogation rights accordingly.

3. Rights Under Statute

Statute law either modifies common law liability or imposes liability additional to that at common law. The statutes concerned are—

(*a*) Carriers Act, 1830.
(*b*) Pawnbrokers Acts, 1872 and 1960.
(*c*) Railway Fires Acts, 1905 and 1923.
(*d*) Hotel Proprietors Act, 1956.
(*e*) Occupiers' Liability Act, 1957.

(*a*) CARRIERS ACT, 1830

The term "common carrier" applies to all persons who undertake to the public to carry, for hire, goods from one place to another. Apart from such things as dangerous goods, which in certain circumstances may be refused, a common carrier must accept service from anyone who chooses to employ him. Examples of common carriers include—

(i) Railways (so far as goods are concerned).
(ii) Certain road services.
(iii) Barges (normally operating on rivers or canals).

The carriage of passengers *only*, the ability to refuse contracts at will or work undertaken casually by special contracts, all constitute types of carriage which designate the persons concerned *special* carriers and not *common* carriers.

A common carrier is, by the custom of England, responsible for the safety of all goods delivered to him for carriage. If, therefore, such goods are damaged or destroyed by fire while in the possession of a common carrier he is strictly liable to the owner whether guilty of negligence or not.

The liability of a common carrier, however, may be varied as follows. He is relieved of liability—

(*a*) where the loss is caused by—

(i) Act of God. This has been defined as some elemental force of nature which could not possibly be foreseen, e.g. lightning;

[1] I.e. on fabrics.

(ii) Spontaneous combustion or other inherent vice and natural deterioration;

(iii) The Queen's enemies;

(iv) Any act or omission of the owner or sender, e.g. wrong labelling; inadequate packing.

(*b*) where he contracts out of liability by special arrangement with the consignor. (He cannot contract out of liability generally, e.g. by a public notice.)

(*c*) where the transit is at an end. If the goods which were being carried are then warehoused by the carrier, his liability becomes that of an ordinary bailee. Even then his liability only continues for a reasonable period, i.e. until the consignee has had time to collect the goods, unless the subsequent storage is otherwise subject to special terms.

His liability is modified by—

(*d*) the Carriers Act, 1830. This Act stipulates that where certain classes of goods of a valuable nature (including pictures, gold and silver articles, china, silks, precious stones, jewellery, watches, bank notes, securities and furs) exceed £10 in value and are contained in any one parcel (or over £25 for railways) the carrier shall not be liable unless the nature and value of such goods are declared and extra charges paid, if required.

In Scotland, a carrier's liability for loss or damage caused by accidental fire is confirmed by the Mercantile Law Amendment Act, Scotland, 1856, which overrides the rule of *damnum fatale*. Before the passing of the Act, it was possible for the carrier to plead this rule as a defence.

The two main carriers, British Railways and British Road Services each carry goods under its own terms and conditions, the more important ones, so far as liability is concerned, being as follows—

British Railways Board and British Road Services

Each of the two main carriers, British Railways Board and British Road Services, carries goods under its own "Conditions of Carriage." Basically, these conditions are the same for both carriers, and the main exclusion, in addition to those already mentioned under (*a*)(i)–(iv) above, is loss or damage resulting from riot, civil commotion, and strikes. The British Railways Board's conditions also exclude loss or damage arising from "Casualty (including fire and explosion)." The exact meaning of "casualty" has never been defined, but compensation for loss or damage by fire is a very rare occurrence.

Notwithstanding the above, both carriers' conditions state that they shall not be relieved from liability where loss or damage arises and they

fail to prove that they used all reasonable foresight and care in the carriage of the merchandise.

The foregoing remarks apply to goods conveyed at the carrier's risk. If goods are conveyed at owner's risk, British Railways accept liability only if it can be proved that any loss or damage arises from the wilful misconduct of the Board.

Compensation from either body (if forthcoming) is as follows—

(*a*) Up to £10. Paid in full.

(*b*) Over £10. *Total loss* paid in full up to a limit of £800 per ton gross weight.

Partial loss. Such proportion of the sum ascertained as for total loss which actual value of that part of the consignment (lost or damaged) bears to actual value of whole consignment. Thus the amount of compensation varies with the weight and value and cannot be ascertained until a claim arises.

(*b*) Pawnbrokers Acts, 1872 and 1960

These Acts, which also apply to Scotland, but not to Northern Ireland, are concerned only with pledges on which a loan not exceeding £50 has been made. By Sect. 27, the pawnbroker is held liable to compensate the pawner in the event of loss or damage by fire. The section reads as follows—

> Where a pledge is destroyed or damaged by or in consequence of fire, the Pawnbroker shall, nevertheless, be liable on application within the period during which the pledge would have been redeemable, to pay the value of the pledge after deducting the amount of the loan and profit, such value to be the amount of the loan and profit, and twenty-five per cent on the amount of the loan.
>
> A Pawnbroker shall be entitled to insure to the extent of the value so estimated.

The period referred to is six months and seven days from the date of pledging, and compensation (which in effect is limited to 25 per cent of the loan) is normally payable only on production of the pawn ticket (or declaration, if lost) which refers to the method of compensation but includes also the words: "unless otherwise agreed upon by the pawner and Pawnbroker."

The word fire means accidental fire, and a pawnbroker would be fully liable for any damage caused by negligence.

(*c*) Railway Fires Acts, 1905 and 1923

In the absence of negligence, a railway operating locomotives (except on public highways, see p. 95) under express authority conferred by statute is, as a general rule, not liable for destruction of or damage to

property by fire caused by the escape of sparks, cinders, or other burning material from its engines, provided such engines are, at the time of the fire, being used in accordance with the statutory authority. If negligence can be proved, however, no such protection is available, and the company is normally liable for all consequences attributable to the original cause. Negligence can arise in the following ways—

(i) The use of an improper type of engine.

(ii) Where the spark arrester in the chimney is inadequate or defective.

(iii) Negligent driving by the engine crew whereby excessive sparks or cinders are allowed to escape.

(iv) The deposit by the side of the line of inflammable materials such as hedge or grass cuttings which can easily be ignited by sparks from passing engines. In this event the engine design is immaterial, since the negligence arises through the provision of a fuel upon which sparks may feed.

(v) The burning of hedge or grass cuttings or the like, or the firing of grass banks by railway employees.

By virtue of the Railway Fires Act, 1905, however, a railway operating under statutory powers is made strictly liable for fire damage to certain agricultural land or crops. The following are the main provisions of the Act so far as damage by fire is concerned.

(*a*) (i) *Agricultural land* includes arable and meadow land, ground used for pastoral purposes or for market or nursery gardens, plantations, woods and orchards, and fences belonging thereto. Buildings and moorlands are *not* included.

(ii) *Agricultural crops* include any crops on agricultural land, whether growing or severed, provided they are not led (i.e. carted away from the place where grown) or stacked (i.e. placed after cutting on *some other site*).

(*b*) *Compensation* is limited to £200. Although this is still the *official* figure, it was announced in January, 1958, by the Minister for Agriculture, Fisheries and Food, that the figure would be increased to £400, although it was not intended to amend the Act for the time being.

(*c*) *Notice in writing* of the fire and intention to claim must be sent to the railway within seven days.

(*d*) *Particulars in writing* of the damage and the amount claimed (not exceeding £400) must be sent within twenty-one days of the occurrence of the damage.

(*e*) *Payments due under any Cereal Deficiency Payment Schemes* in force at the time of the fire can be claimed provided the total amount claimed does not exceed the limit of £400 (*Langlands, J., (Swanley) Ltd.* v. *British Transport Commission*, [1956] 2 All E.R. 702).

(*f*) *A railway may enter upon any land* in order to extinguish or prevent the spread of fire caused by sparks from its engines. Such acts must be reasonable.

As stated at the beginning of this section, the consequences of fire damage cannot be escaped if caused by negligence. If a fire starts just or soon after an engine has passed, it is almost prima facie evidence that the cause was a spark or cinder from the engine. Nevertheless, negligence must still be proved if recovery outside the Act is contemplated, the onus of proof being on the plaintiff.

If the statutory authority does not expressly authorize the use of engines or the engine is a traction engine using a public highway, liability for loss or damage caused by sparks from such engines is apparently absolute irrespective of any precautions taken.

(*d*) Hotel Proprietors Act, 1956

By the custom of England an innkeeper (or as he is now called for the purposes of this Act an hotel proprietor) is strictly liable for the safety of his guests' property irrespective of negligence (apart from an Act of God, the Queen's enemies or negligence on the part of the guest), but this liability (unless due to the negligence of the proprietor) was modified in 1863 by the passing of the Innkeepers' Liability Act. The modern innkeeper is in a very different position from his predecessors of earlier years and the new Act was designed to bring the law into line with present-day circumstances. The salient points of the Act are—

(i) *Definition of Hotel*

A hotel is defined as "an establishment held out by the proprietor as offering food, drink and, if so required, sleeping accommodation, without special contract, to any traveller presenting himself who appears able and willing to pay a reasonable sum for the services and facilities provided and who is in a fit state to be received."

This definition is clear. There must be provision of facilities for travellers including sleeping accommodation without special contract, e.g. advance booking. A licence is not essential.

(ii) *Liability*

(*a*) *Scope.* The liability of the hotel proprietor extends to loss of or damage (fire damage being unexcluded)[1] to property brought to the hotel by a guest, but only if the guest, or someone on his behalf at the material time, has actually engaged sleeping accommodation. Thus people calling for odd meals or drinks do not come within the

[1]According to Welford and Otter-Barry's *Fire Insurance*, 4th ed., p. 445, an innkeeper was liable for loss occasioned by accidental fire (*Searle* v. *Laverick* (1874), L.R. 9 Q.B. 122, per Blackburn, J., at p. 126) and in Halsbury's *Law of England*, 3rd ed., Vol. 21, p. 432, "loss" (under the Innkeepers' Liability Act, 1863) would include loss by accidental fire (*Thorogood* v. *Marsh* (1819), Gow 105).

scope of the Act. The Act does not extend to include strict liability for vehicles or any property left therein.

(*b*) *Time.* The loss or damage must occur "during the period commencing with the midnight immediately preceding, and ending with the midnight immediately following, a period for which the traveller was a guest at the hotel and entitled to use the accommodation so engaged."

(*c*) *Limits.* There is a limit of £50 in respect of any one article and £100 in the aggregate per guest except where—

(1) the property is . . . lost or damaged through the default, neglect or wilful act of the proprietor or some servant of his; or

(2) the property is deposited by or on behalf of the guest for safe custody with the proprietor; or

(3) after arrival the proprietor refuses or is unable by default to accept safe custody of property when offered for deposit by the guest.

(*d*) *Notice.* In order to secure the protection of the Act (so far as the limits are concerned), a copy of the notice set out in the schedule to the Act must be conspicuously displayed where it can conveniently be read by the guests at or near the reception office or desk, or if there is no such office or desk, near the *main* entrance to the hotel. The wording of the notice is as follows—

NOTICE

LOSS OF OR DAMAGE TO GUESTS' PROPERTY

Under the Hotel Proprietors Act, 1956, an hotel proprietor may in certain circumstances be liable to make good any loss of or damage to a guest's property even though it was not due to any fault of the proprietor or staff of the hotel.

This liability however—

(*a*) extends only to the property of guests who have engaged sleeping accommodation at the hotel;

(*b*) is limited to £50 for any one article and a total of £100 in the case of any one guest, except in the case of property which has been deposited, or offered for deposit, for safe custody;

(*c*) does not cover motor-cars or other vehicles of any kind or any property left in them, or horses or other live animals.

This notice does not constitute an admission either that the Act applies to this hotel, or that liability thereunder attaches to the proprietor of this hotel in any particular case.

The Act specifically refers to the fact that it will not apply in the event of default, neglect or wilful act on the part of the proprietor. Thus if loss of or damage to a guest's property is occasioned by the proved negligence of the proprietor or his servants then he is fully liable.

Negligence on the part of a guest himself leading to loss of or damage to his own property will relieve the proprietor from liability.

One important difference between the old and the new Acts is the

reference in the latter to "damage." Under the 1863 Act, there was a difference of opinion as to whether an innkeeper was strictly liable for damage to a guest's property generally, in the same way as he was responsible for loss. In *Williams* v. *Owen*, [1955] 1 W.L.R. 1293, the judge held that the 1863 Act did not apply when property was merely damaged by fire and added that the Fires Prevention (Metropolis) Act applied in the absence of negligence. This was also referred to by the Law Reform Committee appointed in 1953 to look into the 1863 Act. The Committee said—

> In the absence of any clear decision to the contrary, we think that the wording of Section I of the Act of 1863 may well be sufficient to justify the view that an innkeeper is, at law, under the same strict liability for damage to goods as he undoubtedly is in the case of loss, but the matter is not free from doubt.

These doubts have now been dispelled by Sect. I (2) of the 1956 Act which reads—

> The proprietor of an hotel shall, as an innkeeper, be under the like liability, if any, to make good to any guest of his any *damage* to property brought to the hotel as he would be under to make good the loss thereof.

Nothing is said specifically about fire damage and, as mentioned earlier, the inference therefore is that damage by fire is not excluded.

(*e*) Occupiers' Liability Act, 1957

From a fire (or other insured peril) point of view, this Act appears to add little to the position existing prior to the Act. It centres round the duty of common care, defined as

> . . . a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor [anyone lawfully on the premises, i.e. not a trespasser] will be reasonably safe in using the premises for the purposes for which he is invited and permitted by the occupier to be there.

It is, however, important to remember that an occupier is free to extend, restrict, modify or exclude such duty by agreement or otherwise.

It is made clear that the law relating to the carriage of goods and bailment is unaffected by the provisions of the Act, and a bailee of goods is therefore liable for loss of or damage to goods belonging to other persons caused by his negligence whilst they are on his premises. Sect. 4 of the Act, however, lays down that where a landlord is obliged under a tenancy agreement to maintain or repair premises he owes to all persons who or whose goods may from time to time be lawfully on those premises the same common duty of care as if he were the occupier of the premises. Although primarily liability for damage occurring on premises always rests upon the occupier, subject to the terms of any agreement between the landlord and tenant, a tenant (and bailee)

might, in certain circumstances, possess a right of action against a landlord if a visitor's goods were to be damaged by a defect in the premises to which the landlord's attention had been drawn, but who had chosen to take no action or been unreasonably dilatory in having the defect remedied. It appears that the visitor would have a similar right. This is rather involved and would be dependent on fact in every case.

It has been said of this Act that although property is mentioned in the Act as being protected by it, it is only protected by it to the same extent as property ever was protected under the old law of invitor and invitee, the only difference being that instead of owing some other duty, the common duty of care in respect of the property is now owed.

4. Rights Over the Subject-matter

An insured who has received an indemnity from the insurer cannot retain any salvage if to do so would result in his being more than fully indemnified. On receipt of payment for the loss, therefore, he must, if so requested, hand over the salvage to the insurers who then become the owners and can dispose of it to the best advantage. The insured cannot abandon salvage to the insurers, however, and in practice mutually satisfactory arrangements as to the disposal of salvage are usually made.

LEGAL PROCEDURE FOR POSSIBLE RECOVERY

Civil actions involving fire insurance claims are brought in the 400 or so County Courts (which have nothing whatever to do with counties) in England and Wales, provided the amount of the claim does not exceed £400, although actions involving amounts over £400 can be brought in these courts if both parties agree. The districts served by these courts are so arranged that in all parts of the country there is a County Court within reasonable distance.

Actions involving claims over £400 are brought in the High Court. In London, this means the Queen's Bench Division, and in the provinces the Assizes held in certain towns (normally the County Towns) throughout the country. Most actions involving subrogation rights are brought in the High Court and the following remarks are based on procedure in connexion therewith.

If it proves impossible for the parties involved to reconcile their views and they thus fail to come to some mutually satisfactory agreement, the insurer exercising his rights has to decide whether or not his case is sufficiently strong to take legal action, not necessarily with the ultimate idea of a hearing in court, for few cases go so far, but to show the other side that he is serious in his determination to take the matter further. He therefore submits full details of the case to a solicitor

(usually a member of a firm conversant with insurance practice) who, if after full consideration of the facts, decides that it is worth while proceeding, so advises his principal and on the latter's instructions issues a writ of summons,[1] necessary in all common law actions dealt with in the High Court. In order to arrange for the issue of a writ, the solicitors acting for the insurer go to the District Registrar of the High Court of Justice in one of the ninety or so provincial towns or to the Central Office of the Royal Courts of Justice in London. There, the writ is drawn up by the plaintiff's solicitors and stamped by an official on payment of a fee, and details of the case are registered. As the action has to be taken in the name of the insured, he becomes the plaintiff and the third party becomes the defendant.

The writ, which includes a statement of the general nature of the plaintiff's claim, refers to the plaintiff and the defendant by names, and commands the latter, within eight days after the service of the writ, to "cause an appearance to be entered for you in an action at the suit of . . . (*the plaintiff*)" Appearance here merely means that the defendant has to acknowledge the serving of the writ by filing a document at the office of the district registrar, or at the Central Office in London. If he so fails to do, judgment may be given in his absence. In most cases, however, the solicitors to both parties will have been in correspondence before the action is started and the writ is, by arrangement, served on the defendant's solicitors. If the defendant does not employ solicitors the writ must be served on him personally, but can be served by post if the defendant is a limited company.

Once the writ has been served on and a formal "appearance" entered for the defendant, the purpose of further proceedings before the trial (if the action goes so far) is to clarify the dispute. All negotiations are carried out by the solicitors to both parties, usually in consultation with barristers (i.e. counsel) who draft the documents required and advise the best means of attack or defence. The plaintiff's solicitors sends to the defendant's solicitors a *Statement of Claim* (this may sometimes accompany the writ) which sets out the circumstances of the incident giving rise to the claim and details the reasons for the assertion that the defendant is liable for the damage so caused. The defendant's solicitors then submit the *Defence*, usually a complete denial of liability. Neither of these documents deals with evidence as such. These and other documents which may be brought into use are referred to as *Pleadings* (described as "the written statements of the parties in a suit at law"). Once the case comes before the court, these statements cannot be varied except by leave of the court.

The general object of these documents or statements is that each party

[1] In the insured's name.

shall know with some precision the case he has to meet and this process must be complete before the parties go into court. The process of pleadings comes under the control of officers of the court and to bring this about the plaintiff issues a *Summons for Directions* which orders the defendant to meet the plaintiff at the office of the District Registrar (or a Master at the Courts of Justice in London) before whom preliminary matters are dealt with in order that everything may be in order when the case finally comes before the court. These proceedings are known as *Interlocutory Proceedings* and, for example, each side may be directed to produce any documents or to disclose any facts deemed to be material to the point at issue. This production of documents or disclosure of information is known as *Discovery.* As part of the interlocutory proceedings, arrangements may also be made to limit the calling of expert witnesses and to take any other steps to reduce costs. Eventually, the pleadings are closed and the case is ready for trial.

The place for the action to be heard is decided by the District Registrar or Master. He receives suggestions from both sides and endeavours to fix a place mutually convenient to all. If, however, the parties concerned cannot agree on this point, he makes his own decision, which is then binding on both sides. The case is then set down for trial accordingly.

At the trial each side, usually represented by counsel, presents its case. The plaintiff's counsel "opens the case" by presenting an account of the facts and making reference, where necessary, to any documents. The plaintiff's witnesses are then called (by subpoena,[1] if necessary); they are examined by plaintiff's counsel and cross-examined by defendant's counsel. The case is then taken up by defendant's counsel and a similar procedure followed. Each counsel then summarizes the evidence and advances his arguments, plaintiff's counsel having the privilege of speaking last. Judgment is then given, the judge stating the grounds on which his decision is given.

Many proceedings are commenced but relatively few (said to be 2 to 3 per cent) reach trial. Often the issue of a writ is little more than a tactical move in negotiations for a settlement, and thereafter the defendant may settle the action by paying the sum claimed or an agreed sum by way of compromise. It is not unknown for proceedings to continue up to the day of the trial and then to be withdrawn at the last minute, settlement being reached "out of court."

Although these remarks have been made in connexion with insurers' subrogation rights, the procedure would also be followed in the event of a dispute between insured and insurer in matters involving liability, e.g. refusal to meet a claim, although such disputes are now rare. In

[1]An order compelling a witness to attend to give evidence.

matters involving liability, the grounds on which the insurers' denial of liability is based must be specifically and accurately set out in the defence, for the judge can only reach a decision on the case as set out in the pleadings. If, therefore, the defence has been incorrectly prepared, a decision may be given which does not properly cover the real issue concerned.

WARRANTIES

Condition No. 10. Every Warranty to which the property insured or any item thereof is, or may be, made subject, shall from the time the Warranty attaches apply and continue to be in force during the whole currency of this Policy, and non-compliance with any such Warranty, whether it increases the risk or not, shall be a bar to any claim in respect of such property or item; provided that whenever this Policy is renewed a claim in respect of destruction or damage occurring during the renewal period shall not be barred by reason of a Warranty not having been complied with at any time before the commencement of such period.

A warranty is an undertaking by the insured that—

(*a*) some particular thing (i) shall be (ii) shall not be done, or

(*b*) that some condition shall be fulfilled, or

(*c*) whereby he (i) affirms or (ii) negatives the existence of a particular state of facts.

Warranties fall into two classes—

(*a*) where their deletion is not permitted, e.g. daily removal of trade waste, such as shavings or paper; and

(*b*) where their deletion is normally permitted on request in return for a higher rate of premium, e.g. prohibition of power-driven woodworking machinery.

Either way warranties are designed and incorporated in a policy to avoid a known possible increase in risk, and once there remain operative during the entire currency of the policy, unless cancelled or modified. They must be complied with strictly or, if a statement of fact, be strictly and literally true. Warranties go much further than representations (statements made during negotiations leading up to the conclusion of the contract) which first must be material to the risk, and secondly need only be substantially correct.

A breach of warranty, therefore, enables the insurer to avoid a claim in respect of the policy or item concerned—

(i) at any time after the breach during the first period or subsequent renewal periods, and

(ii) whether or not the breach has any connexion with the claim or increases the risk.

Once the policy has been renewed, however, a fresh period begins, and non-compliance with a warranty during the *previous* renewal period is ignored so far as the current renewal period is concerned.

This, then, is the strict legal position which, in many instances, could

be said to bear harshly on an insured. In practice, therefore, insurers will usually waive a breach of warranty if it is merely technical and does not prejudice them in any way. Insurers, too, are usually tolerant where a breach is occasioned by a tenant or other occupier without the insured's knowledge. The only other occasions on which an insured might escape responsibility for a breach would be where the warranty was not capable of fulfilment or where compliance therewith could be said to be against public policy.

When they report on losses where the respective policies incorporate warranties, adjusters investigate the position carefully, and once satisfied that there has been compliance with such warranties include in their report a statement to this effect.

The Law Reform Committee referred to warranties (promissory undertakings) in their report and confirmed the position as outlined above. In their summing up, however, they did not recommend any change in the present law.

ARBITRATION

Condition No. 11. If any difference shall arise as to the amount to be paid under this policy (liability being otherwise admitted), such difference shall be referred to an Arbitrator to be appointed by the parties in accordance with the Statutory provisions in that behalf for the time being in force. Where any difference is by this condition to be referred to arbitration the making of an award shall be a condition precedent to any right of action against the insurer.

Arbitration conditions were one of the subjects dealt with by the Law Reform Committee. The original form of arbitration condition in the standard policy stipulated that *all differences arising out of the policy*, i.e. differences as to liability or amount, had to be referred to arbitration, and the Committee felt such a stipulation might bear harshly on an insured. Two reasons were given.

(i) Legal aid is not available in an arbitration.

(ii) An insurer who proposed to rely on a technically valid but unmeritorious defence might, by insisting on arbitration, avoid the damaging publicity which would attend such tactics if they were used in court. There was no feeling that insurers were in fact in the habit of acting in this way, but having had their attention drawn to this, insurers at once agreed to refrain in general from insisting upon the enforcement of arbitration conditions if the insured preferred to have liability, as distinct from amount, determined by a court in the United Kingdom. In fact, insurers acted before the report was published. Following upon this agreement the Arbitration condition in the standard policy was altered accordingly.

The modified condition now in use limits compulsory arbitration to disputes as to amount only and will have the effect of reducing still further the few disputes hitherto referred to arbitration. Nevertheless,

the basic principles attaching to arbitration remain unaltered and are summarized hereunder—

(*a*) The law as to the settlement of disputes by arbitration is set out in the Arbitration Act, 1950 (in Scotland, the Arbitration (Scotland) Act, 1894, applies). The Act, *inter alia*, regulates the procedure for the conduct of proceedings, including the administration of oaths, the summoning of witnesses by subpoena and the imposition of penalties for perjury. Another part provides that where there is an agreement (as in the arbitration condition) to submit differences to arbitration, if one party nevertheless institutes legal proceedings against the other, the latter may apply to the court for a stay of proceedings.

(*b*) The making of an award shall be a condition precedent to any right of action against the insurer. This means that an award must be given before the insured can take any further action, which in any event would be limited to the enforcement of the award.

(*c*) There is no right of appeal, as such, from an arbitrator's award, but the loser can apply to the court for the award to be referred back for further considerations, or for it to be set aside in the following circumstances—

(i) where the arbitrator has misconducted himself or the award has been improperly secured (e.g. by fraud);

(ii) where the award is ambiguous;

(iii) where fresh evidence is discovered;

(iv) where it appears that the award has been based on an error of law or fact;

(v) where the award exceeds the limits of the submission;

(vi) where there is a defect in execution.

(*d*) Either party may refer to the court any points of law in which a ruling is desired. There is a right of appeal from the ruling given.

(*e*) Discretion as to costs rests in the hands of the arbitrator, who will be guided by the circumstances of the particular case.

(*f*) Arbitrators are often barristers or lawyers, or sometimes business men who have expert knowledge of the matter under dispute.

(*g*) Sect. 6 of the Act includes a provision that the reference shall be to a single arbitrator. If the parties do not concur in the appointment of an arbitrator the court has power to appoint one (Sect. 10).

(*h*) Arbitration proceedings follow closely the form observed in court of law. One essential difference is that when the arbitrator has made his award he does not straightway make its terms known, but writes to the solicitors to both parties intimating that his award is ready and will be forwarded to either party on payment of the costs of the reference, the amount of which costs he states.

(*i*) The award is final in the absence of clerical errors or unintentional

mistakes. Both these can be corrected, but the judgment itself must stand.

As mentioned earlier, it is probable that few cases will now be referred to arbitration, for most differences can be settled without recourse to such a step. There is, however, the occasional claimant who elects to go to arbitration for the following reasons—

(*a*) whilst honest, he cannot or will not see the fairness of the position taken by the insurer;

(*b*) he gives notice of arbitration without due consideration of what it entails;

(*c*) he intimates his intention to go to arbitration in the hope that the insurer will pay more than could reasonably be expected rather than incur the expense and trouble of disputing the case.

Although the present condition refers only to the amount payable, cases might arise where both liability *and* amount are concerned. As liability would have to be dealt with in open court, it might be mutually agreed for the court to deal also with the amount to be paid.[1] In the absence of any such agreement the dispute as to amount could be referred to arbitration once liability were admitted.

Procedure

Once it has been decided that a "difference" is to be settled by arbitration, the solicitors for each party take the appropriate steps. First of all, the arbitrator is appointed by the parties and usually there is little difficulty in obtaining agreement on this point. As previously mentioned, if agreement is not forthcoming, the matter must be referred to the court, for the current arbitration condition allows only a single arbitrator, unlike the former condition whereby if the parties were unable to agree upon a single arbitrator each party could appoint its own arbitrator, the two arbitrators appointing an umpire in case they did not agree.

Having accepted the appointment, the arbitrator will probably hold a preliminary hearing at which he will give directions as to the dates by which the preliminary steps shall be taken. These follow closely the steps taken in connexion with actions brought before the courts (see p. 114) commencing with pleadings by the parties. Each side sets out particulars of his case, viz. "points of claim" by the claimant followed by "points of defence" by the respondent, and either side may request further particulars in connexion with the points of claim or defence. If such further particulars are refused, or the party requesting them is not satisfied as to their adequacy, the party aggrieved may apply to the arbitrator for directions. As in an action, the object of pleadings is to

[1] What would probably happen is that once liability had been established the difference over amount would be referred to the official referee.

ensure that each party may know the case he has to meet and the arbitrator the points which are being referred to him to decide.

After pleadings are closed, there follows "discovery of documents," i.e. each party discloses to the other documents in his possession which may be relevant to the dispute. The place of time and sitting are then arranged and proceedings are normally conducted as in the court. Each side can be legally represented, but it is then usual to give previous notice to this effect to the other side. The claimant states his case and calls his witnesses who are examined by his representative (counsel or solicitor) and then cross-examined by the respondent or his representative. After the claimant's case is closed the respondent calls his witnesses who, in their turn, are examined and cross-examined. Final addresses to the arbitrator are made by both sides and these addresses conclude the hearing.

The arbitrator does not make the terms of his award known at once but writes to the solicitors for each party saying that the award is ready and that it will be forwarded to either party on payment of his fees. He gives no reasons for his findings. At this point, the arbitrator's work is finished and his award cannot be set aside unless for one or more of the reasons previously mentioned. This, however, would be very unusual. The costs of the arbitration are at the discretion of the arbitrator and are usually paid by the unsuccessful party.

Advantages of Arbitration

With the limitation of arbitration to differences of amount only, many of the former advantages have become less important, particularly that of publicity. In the past, no insurer would have been unduly worried if the proceedings in an open court had been reported accurately, but so often incomplete and sometimes distorted reports were made, particularly in the less responsible newspapers, leading the public to believe, as a general rule unjustifiably, that policyholders were being treated harshly. Insurers, therefore, welcomed the private proceedings of arbitration. These cases dealt mainly with liability now no longer within the scope of the arbitration condition.

Some of the present advantages are—

(*a*) Proceedings are less formal, often less expensive, and quicker than those in an ordinary court of law.

(*b*) Obligatory arbitration prevents litigious insured from taking disputes to court.

(*c*) It is customary to choose arbitrators who are conversant with insurance law or the nature of the business concerned in the dispute.

There are no disadvantages in arbitration apart perhaps from the insured who thinks he will get fairer treatment in the courts. A good solicitor may be able to alter such views.

MARINE CLAUSE

Condition No. 12. This Insurance does not cover any destruction or damage to property, which at the time of the happening of such destruction or damage is insured by or would but for the existence of this Policy be insured by any Marine Policy or Policies, except in respect of any excess beyond the amount which would have been payable under the Marine Policy or Policies had this Insurance not been effected.

Most marine policies insuring commodities of any kind give automatic cover for specified periods before loading on board ship at the port of departure and after unloading at the port of arrival. Fire policies may also cover such goods in warehouses or on quays before loading or unloading. Thus there could be double insurance. This condition seeks to limit the liability of the fire policy to any excess of loss not met by any marine policy in force covering identical property, but as many marine policies incorporate a similar clause, i.e. limiting liability to any excess of loss not met by any *fire* policy, the position of the insured is difficult. In practice, any loss arising in such circumstances is settled by arrangement between the companies concerned, for it would be absurd for an insured to hold two policies each covering his liability and yet be unable to recover under either. If, however, the marine policy has no such limiting clause, then the marine insurers would probably be considered as primarily liable, and the liability of any corresponding fire policy would be limited to any excess not met by the marine policy.

In insurances in *cotton* which is covered at the same time by both marine and fire policies, difficulties arising under the resultant overlapping have been settled in a different manner. The appropriate clause inserted in a fire policy in these circumstances reads as follows—

Marine Clause (*Cotton*). Notwithstanding anything contained herein to the contrary, any liability under this policy in respect of any destruction of or damage to Cotton which at the time of the happening of such destruction or damage is insured by or would, but for the existence of this or any other policy, be insured by any Marine Policy or Policies, shall not exceed the rateable proportion of the destruction or damage for which there would have been a liability under this Policy had such Marine Policies also been liable.

Thus instead of purporting to transfer all liability on to the marine policy (as in the Standard Policy Marine Clause) this clause accepts contribution, only restricting the liability of the fire policy to its rateable proportion of any loss.

A similarly worded clause is incorporated into marine policies covering cotton.

CONTRACTING PURCHASER'S INTEREST CLAUSE

Condition No. 13 (sometimes unnumbered). If at the time of destruction or damage to any building hereby insured the Insured shall have contracted to sell his interest in such building and the purchase shall not have been but shall be thereafter completed, the Purchaser on the completion of the purchase, if and

so far as the property is not otherwise insured by or on behalf of the Purchaser against such destruction or damage, shall be entitled to the benefit of this Policy so far as it relates to such destruction or damage without prejudice to the rights and liabilities of the Insured or the Insurer under this Policy up to the date of completion.

This condition relieves a contracting purchaser of the necessity to notify the vendor's insurers[1] in order to secure protection of the latter's policy. The following features need emphasis.

(*a*) The condition operates in respect of *buildings only*.

(*b*) The purchase must be eventually completed.

(*c*) The contracting purchaser must not have effected any insurance of his own.

(*d*) All rights and liabilities of both vendor and insurer remain unaffected.

On p. 104 reference was made to the Law of Property Act, 1925, by the provisions of which a contracting purchaser could obtain the benefit of the vendor's policy, provided due notification was given to the vendor's insurers. This protection is now automatic, subject always to the limitations set out above.

Once the purchase has been completed the purchaser must take steps, if he so wishes, to have the vendor's policy transferred to his name. Otherwise, since it is a personal contract, the vendor's policy ceases to apply when his interest has terminated.

If the property concerned has also been insured by the purchaser and is damaged by an insured peril during the negotiations, i.e. after the contract has been signed but before completion, the purchaser's policy is considered to be primarily liable and must meet the loss. The condition reads ". . . if and *so far* as the property is not otherwise insured . . . by the purchaser . . . ." The inference seems to be that if the purchaser has insured insufficiently or has only insured the difference between the sum insured on the vendor's policy and the estimated replacement value of the property, then the vendor's policy will be called upon to make up the balance not met by the purchaser's policy.

[1]Although many solicitors still notify insurers of contracts to purchase.

CHAPTER 7

AVERAGE AND CONTRIBUTION

THE word "average" has undoubtedly come from marine insurance, and in its broad sense indicates the sharing of a loss between two or more parties or, in other words, that certain parties will each *contribute to the loss*. Although this is still basically correct, average as applied to sums insured in fire policies has a slightly narrower meaning, because (1) only two parties are involved, the insurer and the insured, and (2) if the sum or sums insured are adequatc the insured does not have to contribute to the loss. This latter statement is the essential feature, for "subject to average" in a policy means that the insured will be penalized, i.e. he will have to contribute to his own loss, *only* if the property covered is insured for less than its value.

It is not known for certain when the principle of average was first applied to fire insurance. The earliest known mention of average is found in the minutcs of the Fire Committee held by the Royal Exchange Assurance in January, 1722, when it was ordered that the following clause be added to all policies covering goods for £500 and upwards—

> If in case of loss or damage it appears that was a greater value than the sum hereby insured and part thereof saved, then this loss or damage shall be taken and born (*sic*) in an Average.

In October, 1725, the wording was altered to read—

> Provided nevertheless, and it is hereby also provided and declared to be the true intent or meaning of this Deed or Policy, that in case the said goods in the house or building aforesaid shall, at the breaking out of such fire or fires, be of greater value than the sum hereby assured, and the same shall not be totally consumed, then the said Corporation shall only pay and make good .... such a proportion of the said loss or damage as the sum .... assured shall bear to the whole value of the goods aforesaid at the time that such fire or fires shall first happen.

Here, then, was introduced for the first time the principle of average as it is understood today, i.e. a comparison of the sum insured with the value at risk. No one seems to know why this Clause was discontinued in 1737, and no reference to average appears again until about 1800, when it was applied to insurances covering a plurality of risks. The wording then used was similar to that set out above. Later, publicity was given to the use of average in connexion with the very heavy stamp duty payable by policyholders at the beginning of the nineteenth century and based *pro rata* on the sums insured. The high rate of duty led to attempts at evasion and many insurance companies were content to

issue policies covering a plurality of risks at sums insured considerably less then the total actual value, provided they received the correct premium based on this figure, the insured consequently paying much less duty. The revenue authorities soon became wise to this practice and put a stop to it in 1828 when an Act was passed stipulating that all policies with sums insured covering in one amount property occasioning a plurality of risks (except the implements and stock on any one farm) had to contain—

> . . . a clause stipulating that in the event of loss or damage by fire . . . the insurer . . . shall be liable to pay or make good such proportion only of the said loss or damage as the sum insured shall bear to the whole collective value of the said property at the time when such fire shall first break out or happen.

This Act was automatically repealed in 1869, when stamp duty based on sums insured was abolished, but offices continued to apply average to plurality of risks and have so done up to the present day.

PRO RATA CONDITION OF AVERAGE

In 1882 the leading insurance offices, not satisfied with the then existing average conditions, agreed new wordings so that for the basic or *pro rata* condition of average the wording was thenceforth as follows—

> Whenever a sum insured is declared to be subject to average, if the property covered thereby shall at the breaking out of any fire be collectively of greater value than such sum insured, then the assured shall be considered as being his own insurer for the difference and shall bear a rateable share of the loss accordingly.

This wording has since remained unaltered apart from the addition of the words "or at the commencement of any destruction of or damage to such property by any other peril hereby insured against" after ". . . breaking out of any fire" in view of the many additional perils which can now be added to fire policies.

The words "*such* sum insured" are important, because they make it clear that the comparison is between the value at risk and the sum insured by the policy into which the condition is written and *not* the total of the sums insured on the property if more than one policy is concerned.

The *pro rata* condition of average is straightforward in its application. If the property covered at the time of loss under a particular policy is insured for a sum less than its value, any loss is shared between insured and insurer in proportion to their respective liabilities, the difference between the value and the sum insured representing the figure on which the insured's share of the loss is to be based. The example shown overleaf illustrates this.

Value at risk ....£1,500.
Sum Insured ....£1,000 (basis of insurer's liability).
Difference .... £500 (basis of insured's liability).

Any loss here is therefore shared between insurer and insured in the ratio 1,000 : 500 or, to put it another way, the insurer is liable for $\frac{1000}{1500} \times$ loss and the insured $\frac{500}{1500} \times$ loss. Thus, assuming a loss of £600, the insurer is liable for and pays $\frac{1000}{1500} \times 600 =$ £400, and the insured is liable for and has to pay $\frac{500}{1500} \times 600 =$ £200 towards his own loss. In practice, this result would be described as the insurer paying £400 and the insured "losing" £200.

The insured must inevitably "lose" if the property covered is insured for less than its value *at the time of the fire (or other peril insured against)*, and conversely he will suffer no loss if he carries a full insurance, i.e. if the sum insured is *not less than* the value of the property covered.

Total destruction of the property insured accompanied by under-insurance results in the payment of the sum insured in full, but the insured will still lose the difference between the sum insured and the value of the property.

Value at risk ....£1,500.
Sum Insured ....£1,000 (basis of insurer's liability).
Difference .... £500 (basis of insured's liability).
Loss ....£1,500.

Insurer pays $\frac{1,000}{1,500} \times 1,500 =$ £1,000 (the sum insured).

Insured loses $\frac{500}{1,500} \times 1,500 =$ £500 (the "difference").

OBJECT OF AVERAGE

The object of average, therefore, is an attempt to prevent under-insurance, and when applied to a sum insured has the effect of penalizing those who do, in fact, under-insure. It is probably true to say that average, as applied at the beginning of the nineteenth century, was confined to those cases where there was plurality of risk, but as time went on its application was extended so that today sums insured are made subject to *pro rata* average in the following circumstances—

1. Where there is Plurality of Risk

(*a*) Two or more risks insured in one amount. Such risks can be in detached buildings, in adjoining buildings separated by party walls, or in fireproof portions of the same building.

(*b*) Property in the open.

(*c*) Floating insurances (property which can be spread over a number of risks at the same time, e.g. stock in various warehouses in Great Britain).

The undermentioned are exceptions to those set out above—

(*a*) Insurances on implements and live and dead stock on farms. (This dates from the 1828 Act referred to earlier.)

(*b*) Extensions of various kinds (e.g. temporary removals) from the main premises insured. (These are considered in detail in Chapter 10.)

(*c*) (i) An insurance on a private house and its domestic outbuildings, walls, gates, and fences belonging thereto. (There are modifications for certain *perils* when such property is insured comprehensively, e.g. gates and fences are not covered against storm and tempest.)

(ii) Insurances by brewers on hotels, public houses, or sale-shops and outbuildings (not exceeding £1,500 any one outbuilding), walls, gates and fences belonging thereto and used in connexion therewith, provided that each hotel, public house or sale-shop with its outbuildings is insured in one amount.

2. Where Under-insurance is Probable

(*a*) Buildings of fire-resisting construction and their contents.
(*b*) Sprinklered risks.
(*c*) Buildings in non-hazardous occupations and their contents.

3. Where Average is made Obligatory in Certain Circumstances

(*a*) Some trades and manufacturing risks.
(*b*) Declaration, maximum value and reinstatement value policies.
(The concessionary nature of these insurances makes some form of average essential.)

4. Where it is Known that Deliberate Under-insurance Exists

The application of average is then left to the discretion of the insurer.

It is sometimes said that the imposition of average is unfair and that insured should be free to choose the sum insured they want without any penalty. To prove the fallacy of such an argument it is only necessary to refer to the basic principle of insurance, namely, the sharing of the losses of the few from the contributions of the many. If these contributions are made inequitably, because those who under-insure do not contribute to the pool in proportion to the risk insured, those who do so contribute are prejudiced, for they pay proportionately more than they should do. Thus the person who under-insures, deliberately or otherwise, *may* suffer hardship in the event of total or nearly total loss, but since most losses are partial he reaps the full benefit of his participation in the fund created by the contributions, notwithstanding the fact that *his* contribution is less than it should be. For this reason it has often been suggested that *all* sums insured should be made subject to average (as, indeed, is done in many other countries), but because the majority

of policies have been free from average ever since fire insurance started in this country over two and a half centuries ago, it is too late to contemplate any such change at this stage. If it were possible to introduce universal average, as it is called, advantage would accrue both to insured and insurer, but there would also be many disadvantages. Some of the obvious advantages and disadvantages are summarized below, not necessarily in order of importance—

Advantages	*Disadvantages*
1. On the assumption that the majority of insurances would be for full value, all property owners would contribute equitably to the common fund.	1. Since the majority of policyholders are not acquainted with average and its operation, it would be difficult to convince them of its necessity.
2. The resultant increase in premium income should result in a reduction in rates.	2. Many insured would resent the imposition of average in the event of loss, although its operation had been explained. (This factor often arises now.)
3. Adequate sums insured would result in the fixing of accurate retentions.	3. It would be necessary to value the property insured every time there was a loss, large or small. This could lead to increased expenses in dealing with claims settlements (unless average were to be ignored for claims under a certain figure).
4. Statistics, e.g. premiums compared with losses, would be more reliable.	
5. Many loss apportionments would be simplified and many anomalies removed.	4. Blanket cover for comparatively small cases would be encouraged, provided there were no rating penalty.
6. Insurances would be arranged more carefully, in view of the need for full value.	5. The present system whereby average is applied judiciously to selected cases, where it is merited, works satisfactorily.
7. Some policy conditions and clauses could be dispensed with, e.g. average and excess policies' conditions; and special condition of average.	6. Disputes would arise over the methods used for calculating values at risk.
	7. Hardships could arise in the event of fluctuating values.

THE SPECIAL CONDITION OF AVERAGE

On the plea of agricultural distress, the Act of 1828 exempted from its provisions sums insured on farming stock and farm implements. It did not take the farmers long to realize that if they spread their produce over a wide area, instead of concentrating it in and around the homestead, a comparatively small sum insured would be adequate to cover all possible losses. This practice became so widespread that offices were obliged to take action to protect themselves against such blatant

under-insurance, but at the same time they had no wish to penalize the farmers unduly in view of the fluctuating nature of the property concerned, i.e. low in value in the early months of the year, but high in value at and around harvest-time and for some time thereafter. As a compromise, insurers stipulated that—

(*a*) Agricultural produce must be insured at all times for not less than three-fourths of its value, and

(*b*) if it were not so covered, *pro rata* average would be applied. The following examples illustrate the principle—

Sum Insured	*Value at risk*	*Payment of losses*
£	£	
1,000	1,000	Losses are paid in full up to the sum insured which, in each example, is *not less than* 3/4ths, viz. £750, of the value at risk.
900	1,000	
800	1,000	
750	1,000	
700	1,000	The sum insured is less than 3/4ths, viz. £750, of the value at risk and *pro rata average automatically applies*, the liability of the insurer being $\frac{\text{sum insured}}{\text{value at risk}}$ i.e. $\frac{700}{1,000} \times$ loss.

To sum up therefore—

(*a*) if the sum insured equals or is more than three-fourths of the value at risk, no average applies;

(*b*) if the sum insured is less than three-fourths of the value at risk, *pro rata*, i.e. full average, applies.

Although it is only in respect of items covering *agricultural produce* that insurers apply the special condition of average, if the items concerned are extended to cover thereunder any other property, e.g. implements, the whole is made subject to the condition. Farm implements can still be insured separately without being subject to any condition of average.

As time went on, insurers found other classes of risk where it was considered a hardship to apply full average (e.g. some engineering works, the contents of motor garages) and today there are many risks to which this special condition applies.

The current wording reads as follows—

> Whenever a sum insured is declared to be subject to the Special Condition of Average, then, if such sum shall at the breaking out of any fire or at the commencement of any destruction of or damage to the property by any other peril hereby insured against, be less than three-fourths of the value of the property insured in that amount the Insured shall be considered as being his own insurer for the difference between the sum insured and the full value of the property insured at the time of such fire or at the commencement of such destruction or damage and shall bear a rateable share of the loss accordingly.

The special (or as it is often called, the "75 per cent" or "three-fourths") condition of average thus gives an insured the ability, if he so wishes, to insure for one-fourth less than the full value at risk at the time of the loss, without incurring any penalty.

The words "at the time of the loss" are important, for, if the property insured is liable to fluctuate in value during the year, the sum insured should be fixed bearing in mind the time when values are at their peak. The farmer, therefore, should base his sum insured on the value at harvest-time, for, although he may be over-insured for much of the year, he is particularly vulnerable at harvest-time and could suffer a heavy loss in the event of fire if his sum insured were less than 75 per cent of the value at risk at that time. In fact, he will only be certain to receive a full indemnity if his sum insured represents the full value at risk at the peak period, because the whole of the stock may be destroyed in a single incident and the insurer cannot pay more than the sum insured.

To meet particular needs, the insurers have, in a few cases, replaced the basic proportion of three-fourths or 75 per cent by another fraction or percentage, e.g. four-fifths or 80 per cent, one-half or 50 per cent, but the underlying principle remains the same. Provided, in the examples given, the sum insured is not less than 80 per cent or 50 per cent respectively of the value at risk, average does not apply.

Blanket Policies

For many years it has been common practice to insure in one amount stock-in-trade floating over many buildings or premises, the buildings or premises themselves and their other contents being insured by means of specific amounts per building or group of adjoining or communicating buildings. In recent years, however, there has been an increasing tendency to extend the "stock floating" method to buildings and contents (other than stock) so that it is now possible to find policies covering property at a large works by means of three items only, viz.—

Item 1 — all buildings;
Item 2 — all contents (excluding stock);
Item 3 — all stock.

Such an arrangement is referred to as "blanketing" and the policies are known as "blanket policies."

Apart from stock items, which are usually on a declaration basis (and so automatically subject to *pro rata* average), the items covering buildings and other contents are either subject to—

(*a*) the *pro rata* condition of average, when the condition, in the event of loss, operates as already explained; or

(*b*) an undertaking by the insured to insure for full value. Such an undertaking may read as follows—

The insured undertake that the sum insured by (*each item of*) this policy shall at all times during the currency of the insurance represent a reasonable estimate of the full value of the property insured hereby.

This undertaking is a promissory and continuing warranty, so that on a strict interpretation a breach would enable the insurers to avoid liability. The word "reasonable" is used, and similar considerations to those already mentioned in relation to the standard policy conditions would apply thereto.

CONTRIBUTION AND AVERAGE CONDITION

Since the object and effect of certain average conditions have been considered, attention can now be given to Condition No. 8—Contribution and Average—of the standard policy. The condition reads as follows—

If at the time of any destruction of or damage to any property hereby insured there be any other Insurance effected by or on behalf of the Insured covering any of the property destroyed or damaged the liability of the insurers hereunder shall be limited to its rateable proportion of such destruction or damage.

If any such other Insurance shall be subject to any Condition of Average, this policy, if not already subject to any Condition of Average, shall be subject to Average in like manner.

If any other Insurance effected by or on behalf of the Insured is expressed to cover any of the property hereby insured, but is subject to any provision whereby it is excluded from ranking concurrently with this Policy either in whole or in part or from contributing rateably to the destruction or damage, the liability of the insurers hereunder shall be limited to such proportion of the destruction or damage as the sum hereby insured bears to the value of the property.

Although this condition bears the short title of "Contribution and Average", it deals entirely with contribution, parts two and three merely stating how contribution will be effected if certain circumstances are present.

Contribution is a corollary of indemnity, for although there is nothing to stop anyone from insuring his property with as many insurers as he wishes, the common law principle of indemnity demands that, in the event of loss, he shall be indemnified and no more than indemnified. It has also been established (*Dering* v. *Winchelsea* (1787) 2 Bos. and P. 270) that where a risk is shared with two or more parties, such parties shall each contribute to any loss in proportion to the respective shares.

Contribution as such then is a common law principle, and it results in a loss being shared with two or more insurers if the insured or any one acting on his behalf has taken out more than one policy on the same property against the same peril.

At common law, however, the principle is maintained provided such

loss is shared *eventually*. Thus an insured could claim the whole of the loss from one insurer only, leaving that insurer thereafter to recover from the others his proportion. By this condition, however, the insurer's liability is limited *at the outset* to its proportion only of the loss, and it is preferable this way, for it brings to light at once the various policies involved and their particular terms and conditions, thus making the apportionments of the loss far more simple. If the apportionments were left until after one insurer had met the whole loss, it is evident that many difficulties could arise.

Before contribution can arise, the following conditions must be fulfilled—

(*a*) There must be two or more policies concerned.

(*b*) All policies must be in force at the time of the loss and must be valid and effective contracts.

(*c*) All policies must cover the same property (although other property may be insured as well).

(*d*) The same peril must be insured against (although other perils may be insured as well).

(*e*) All policies must be in the same interest, i.e. the same insured or someone acting on his behalf.

Provided these conditions are fulfilled, contribution must apply and any loss is shared among the insurers concerned. The existence of more than one policy covering the same subject-matter does not necessarily mean that there is over-insurance. The total effective cover may be just adequate (or even inadequate, i.e. there is under-insurance), but whatever the circumstances no more than an indemnity within the terms and conditions of the respective policies can be given.

The case of *North British & Mercantile Insurance Co.* v. *Liverpool and London & Globe Insurance Co.* (1877), 5 Ch. D. 569[1] is probably the best known dealing with contribution. The circumstances briefly were that some wharfingers, Barnett, in accordance with trade custom had insured grain, their own and on commission (for which they were therefore responsible), while in their granaries. Merchants, Rodocanachi, also insured their grain while in Barnett's possession. A fire destroyed Rodocanachi's grain in the wharfingers' granaries and Barnett's insurers, having met their loss, sought contribution from the insurers of Rodocanachi. It was held, however, that there was no contribution, because the interests were not identical, and that the wharfingers were primarily liable since it was their duty to insure.

This was a friendly action to secure a decision and that decision led to an agreement among the members of the Fire Offices' Committee (now extended to most non-tariff offices and many Lloyds' underwriters) whereby contribution among policies on the same property is

[1]Often referred to as the *King and Queen Granaries* case.

accepted, even if in different interests, provided each office concerned would be legally liable to its insured in the absence of any other current policy covering the same subject-matter.

The complete wording of the Agreement is as follows[1]—

> Where there are two or more subsisting insurances in the names of persons having different rights and liabilities *inter se* covering the same building of any kind, and/or the rent thereof (but not including insurances covering different undivided shares in buildings—whether the fact that the insurance applies to an undivided share only appears on the face of the policy or not) or the same contents of private houses, offices, churches, chapels, schools, hotels, theatres (including Music Halls, Circuses, Cinematograph Halls and any building licensed for Theatrical or Music Hall performances) or retail shops, or the same farming stock, any loss shall as between the Offices be apportioned rateably among all such insurances without regard to the rights and liabilities of the insured *inter se*.
>
> For the purposes of this rule a "subsisting insurance" shall be deemed an insurance effected by or on behalf of anyone having at the time of the breaking out of the fire or at the commencement of any destruction or damage by any other peril insured against, an insurable interest in the subject matter of the insurance, and in respect of which insurance the insuring company, if there were no other then current insurance covering such subject matter, would be legally liable to the insured.

The agreement does not cover *all* classes of property (e.g. merchandise or contents of factories are not included), and the expression "subsisting insurance" is defined.

This agreement is one *among insurers only* and cannot affect the rights of the insured under each policy. It does not, therefore, come within the scope of the policy condition which applies only where the interests are identical. It would operate, for example, where a house was insured by both lessee (under the terms of his lease) and lessor (for his own protection). The lessee's insurer is primarily liable (as a duty to insure is placed on the lessee) and would meet the loss accordingly. The insurer concerned would then seek contribution from the lessor's insurer under the terms of the agreement.

Then there is the meaning of the words "rateable proportion" to be considered. With the fact established that contribution, if any, applies at the time of loss, the method by which the loss is to be shared must be ascertained, and the condition provides that this sharing is to be in "rateable proportions." Unfortunately, the term is not further explained, and two interpretations are possible, namely, that the loss will be shared among the policies concerned in the ratio of—

1. Their relative sums insured, or
2. Their liabilities independently ascertained, i.e. treating the policy of each contributing insurer as if it alone were liable to meet the loss.

Although it has generally been agreed that (2) is probably the correct

[1]See *Contribution in Fire Insurance*, by H. S. Bell (Stevens & Sons Ltd.).

The third part of the condition refers to policies "excluded from ranking concurrently or from contributing rateably (*with this policy*)." These words refer mainly to excess of loss policies (often referred to as "second loss" policies), whereby a property owner can obtain overall protection for less premium than that payable on the normal full value basis.

It is a generally accepted principle that rates are so adjusted that, when applied to sums insured representing the approximate replacement value of the property insured, a pool of premiums is produced out of which all losses, partial or total, can be paid. It is a fact that there are more partial than total losses, and there are some insurers who, because of this, are prepared to issue policies which do not come into operation until the loss exceeds a pre-arranged figure, charging a lower rate of premium accordingly.

It may be estimated, for example, that a building would cost approximately £25,000 to reinstate if totally destroyed, but such a possibility is considered remote and £10,000 is thought to be the largest likely loss.

In the ordinary way with the rate assumed to be 5s. per cent, an insurance based on replacement value would produce a premium of £62 10s. In the absence of any condition of average in the ordinary fire policy, an insured could insure for £10,000 only at 5s. per cent and take out an excess policy for £15,000 at, say, 2s. per cent, thus paying a total premium of £40 only (i.e. £25 + £15). The first policy would still be liable for *all* losses up to £10,000 (the second policy operating only for any loss *above this figure*) and would thus receive too little premium, bearing in mind the basis on which rates are calculated.

The effect of the condition in these circumstances is to introduce *pro rata* average and the insured would suffer accordingly. With an assumed loss of £15,000 on the building, the ordinary policy would pay $\frac{10000}{25000} \times$ £15,000 = £6,000 (taking the value at risk to be £25,000), the excess policy would pay £5,000 (i.e. £15,000 less £10,000), and the insured would lose £4,000.

The result is not unfair because the insured is endeavouring to obtain full protection by paying less than he should do and must therefore take the consequences.[1]

If the loss is less than the excess, the second policy does not contribute at all. With the previous figures and on the assumption of a loss of £5,000, the first policy becomes liable for $\frac{10000}{25000} \times$ £5,000 = £2,000, the second policy is not liable since the loss is less than £10,000, so the insured loses the balance of £3,000.

[1]By special arrangement certain insurers are prepared to issue first, second, and even third loss policies, the rates of premium descending accordingly, but such insurances are not written on standard policy forms.

POLICY EXCESS OR FRANCHISE

An excess of loss policy, as explained already, must not be confused with an excess or franchise incorporated into a policy to give an insurer relief from claims (mainly small) not exceeding a specified figure.

An excess gives relief for a specified amount in respect of each and every loss. Thus, with a £5 excess, an insured who suffers an agreed loss of £12 receives £7 from his insurer. If the claim is £5 or less, no payment is made. Whatever the amount of the claim as finally agreed, *it is always reduced by the amount of the excess.*

A franchise gives relief for each and every claim which does not exceed a specified amount; above that amount the loss is paid in full. Thus, with a £5 franchise, an insured who suffers a loss of £5 or less has no claim, but one who suffers a loss of £9 receives £9. In other words, any loss *exceeding* the franchise is paid in full.

As with an excess, a franchise is incorporated into certain policies solely to avoid the payment of small claims. Such policies are not usually regarded as "policies excluded from ranking concurrently, etc." and average would not be imported unless one at least of the policies concerned was itself subject to average.

Average in Policies Incorporating an Excess or Franchise

If the sum insured by a policy subject to an excess or franchise is also subject to average, the loss can be dealt with in two ways: first by applying average and then dealing with the excess or franchise; and secondly by dealing with the excess or franchise and then applying average.

Excess: Example—

Sum insured	£1,000 subject to average.
Excess	£50.
Loss	£90.
Value at risk	£2,000.

Method 1. Apply average first, when the loss is reduced to $\frac{1000}{2000} \times £90 = £45$ which is less than the excess, so no payment can be made.

Method 2. Deal with excess first, when the loss is reduced to £90 − £50 = £40, which after the application of average is reduced to £20.

Franchise: Example—

With the figures in the previous example but substituting a *franchise* of £50, by method 1 (applying average first) the loss is reduced to £45, which is less than the franchise, so no payment can be made.

By method 2, the loss exceeds the franchise and the amount of £90 is then reduced by average to £45.

In both instances, therefore, the insured benefits by having the excess or franchise dealt with first, followed by the application of average, and it seems fair for any such losses to be settled in this way.

THE TWO CONDITIONS OF AVERAGE

Consideration of the two conditions of average has been deferred because the second condition deals exclusively with contribution, but before proceeding any further, the meaning of two words— "range" and "specific" —must be mastered.

RANGE

One definition of range is "extent of roaming", and these words give some indication of the meaning of range, as understood in fire insurance. Range refers to the extent of—

(i) The classes of property covered; and/or

(ii) The situation or situations at which the property or classes of property are covered.

Examples

(i) *Classes of property covered—*

Policy A covers sugar, flour and eggs.
„ B „ sugar and flour.
„ C „ sugar and eggs.

Policy A covers all that is insured by Policies B and C, and, in addition, covers in each instance another "property," namely, eggs by Policy B and flour by Policy C. In each instance, Policy A is said to be of wider (or greater) range than that of the other two policies. Similarly, Policies B and C are said to be of narrower (or lesser) range when compared with Policy A. When Policies B and C are considered, however, each covers property not insured by the other. Policy B covers flour, but not eggs. Policy C covers eggs, but not flour. Such policies are said to be of *independent range.*

Although it seems probable that the term "independent range" was originally meant to refer to policies which had *something* in common (sugar in the example given above) as a result of which contribution would apply, the term nowadays is often loosely used to include also policies which have nothing in common at all, i.e. they are *completely independent* of each other. No contribution arises with such policies, and in this book, therefore, the term is used to denote policies which have something in common and therefore rank for contribution.

(ii) *Situation or situations at which the property or classes of property are covered—*

Policy A covers sugar in warehouse I.
„ B „ „ „ warehouses I and II.
„ C „ „ „ warehouses II and III.
„ D „ sugar and flour in warehouses I and II.

Similar considerations apply here. Policy A is of narrower range than Policies B and D, because both these policies cover everything that A

does and something in addition. Policy A has nothing at all in common with Policy C, because each covers entirely different situations.

Policy B is of wider range than Policy A, of narrower range than Policy D (since D covers flour as well as sugar), and of independent range with Policy C, for both Policies B and C cover situation II and thus have *something* in common.

Policy C has nothing in common with Policy A, and is of independent range with Policies B and D.

Policy D is of wider range than Policies A and B, but is of independent range with Policy C.

When range is considered, therefore, it is important to ascertain—

(*a*) what property and/or situations are common in the policies under consideration, and

(*b*) what property and/or situations (if any) are covered in addition, in order to establish whether policies are of equal (i.e. identical), wider (or greater), narrower (or lesser), or independent range.

To constitute wider range, a policy must cover *everything* and every situation insured by the policy or policies with which it is being compared, *and other property and/or situation(s) in addition.*

Specific

This word has assumed a particular meaning in fire insurance, although its definition of "definite or precise" remains basically true. It is the word used to describe the relative ranges covered by two or more policies. A policy of wider range is said to be *less specific*, because it is less precise in its application, i.e. it covers more classes of property or situations. Conversely, a policy of narrower range is said to be more specific.

Thus in the last example Policy A is more specific than Policies B and D. Policy D is less specific than Policies A and B. The word "specific" can be used only in connexion with greater or narrower range and *not* with independent range, in which event there is no question at all of any one policy being more specific than another.

To sum up therefore—

More specific corresponds to narrower range, and
Less specific corresponds to wider range.

In addition to the use of the word specific as outlined above, it is often used at the present time to describe a policy covering only a particular risk or a particular property or class of property. For example, it could be stated that wine in warehouse I is specifically insured (or insured by a specific policy) with office X. This means simply that the policy concerned covers the wine as described and nothing else.

It will have been noticed that in dealing with the examples letters have been used to denote the policies (or insurers) and Roman

numerals to denote the risks covered. One of the secrets of working out apportionments successfully is to ensure that the particulars of the various insurances are correctly set out or tabulated before the apportionment is commenced, and in this book all examples are based on letters and Roman numerals as stated. An example of a simple tabulation is as follows—

Policy	A	covers	sugar	in	warehouses	I, II, III and IV.
„	B	„	„	„	„	I and II.
„	C	„	„	„	„	II, III and IV.
„	D	„	„	„	„	III and IV.
„	E	„	„	„	„	IV and V.

Tabulation. (The sign "X" is inserted to indicate the risks covered by the relative policies)—

Warehouse	*A*	*B*	*C*	*D*	*E*
I	X	X	—	—	—
II	X	X	X	—	—
III	X	—	X	X	—
IV	X	—	X	X	X
V	—	—	—	—	X

In practice the tabulation would be set out as hereunder—

<table>
<tr><th>Warehouse</th><th>A</th><th>B</th><th>C</th><th>D</th><th>E</th></tr>
<tr><td>I</td><td rowspan="4">X</td><td rowspan="2">X</td><td>—</td><td>—</td><td>—</td></tr>
<tr><td>II</td><td rowspan="3">X</td><td>—</td><td>—</td></tr>
<tr><td>III</td><td>—</td><td rowspan="2">X</td><td>—</td></tr>
<tr><td>IV</td><td>—</td><td rowspan="2">X</td></tr>
<tr><td>V</td><td>—</td><td>—</td><td>—</td><td>—</td></tr>
</table>

The sign "X" here would be replaced by the relative sum insured. A dash is placed against those warehouses to which the policies do not extend. This is important, for it helps to show clearly the various ranges covered.

With the various insurances tabulated, the following data are obtained.

A covers everything insured by each of B, C and D, and more in addition, and is therefore (i) of wider range and (ii) less specific than those other policies. A does not cover everything covered by E, and is therefore (i) of independent range and consequently (ii) neither more nor less specific.

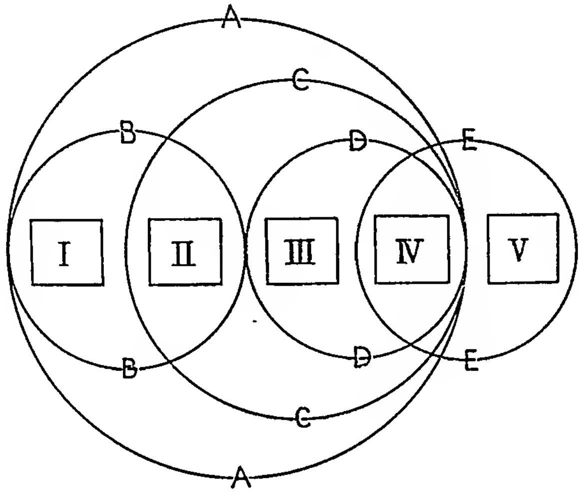
B only covers part of what A covers and nothing else. It is therefore (i) of narrower range, and (ii) more specific than A. It is of independent range with C, and has nothing in common at all with D and E.

C is of narrower range and more specific than A, but is of wider range and less specific than D. It is of independent range with B and E.

D is of narrower range and more specific than both C and A, is of independent range with E, and has nothing in common at all with B.

E is of independent range with A, C and D, and has nothing in common with B.

The following diagram will help to amplify the foregoing.



For example, B, C, and D are all within A, but cover only part of what A insures. Therefore, they are of narrower range and more specific. A and E both cover IV and, therefore, have that much in common, but as each extends to cover something not covered by the other, they become of independent range. Similar remarks apply to D and E. The other relative ranges can be checked by reference to the previous paragraph.

To understand fully the significance of the two conditions of average, it is necessary briefly to consider, first, the reasons for their introduction; and secondly, the subsequent developments which led to the wording in general use today.

The obligatory use of the *pro rata* conditions of average for an insurance covering two or more risks in one amount soon began to cause difficulties in losses involving property insured both specifically (at that time meaning simply not subject to average) and on a floating basis (subject to average), and attempts were made to introduce a clause whereby in such circumstances the specific or non-average policies had to pay up to their respective sums insured *before* the floating policy contributed. It was also stipulated that the value covered by the floating policy would be the total value of the property insured, *less* the amount of the specific insurances. This innovation came into operation some time between 1828 (the year of the introduction of the "Act" average)

and 1843, and formed the basis of what today is the second of the two conditions of average. It is important to keep in mind, however, that only non-average policies were to be exhausted first.

It was this which caused further difficulties, for there was no instruction as to the method to be adopted for dealing with two or more policies each subject to average. To meet this need a further clause, known as the "Independent Liability Clause," was introduced, which provided, in effect, that if average policies came into contribution, each policy would contribute in accordance with its liability independently determined, i.e. sum insured compared with value of property covered.

At this point, therefore, some time after 1843, three "conditions" of average were in force—

(i) the ordinary *pro rata* condition;

(ii) the condition stipulating that non-average policies were to be exhausted before floating policies (subject to average) were called into contribution;

(iii) the condition stipulating that contribution between average policies was to be based on the liability of each policy independently ascertained.

By 1860 so many complications in loss settlements had arisen that the fire offices appointed a committee to inquire into and report on the current average conditions. As the result, the committee recommended the following changes—

1. Average policies, in addition to non-average policies, were to be exhausted before floating policies could be called into contribution, *provided* the latter were of wider range. In other words, *any more specific policy*, whether or not subject to average, was to be exhausted first.

(2) The range of floating policies was to be reduced if there was no property at risk in any of the situations referred to therein.

The offices accepted these recommendations, which were embodied into *three conditions of average* and adopted throughout the country, but by 1882 it was found that they still did not overcome certain difficulties. A sub-committee was formed to consider and report on these difficulties and produced the two conditions of average as known today, apart from the extension to include perils other than fire. The current wording is as follows—

TWO CONDITIONS OF AVERAGE

1. Whenever a sum insured is declared to be subject to Average, if the property covered thereby shall at the breaking out of any fire or at the commencement of any destruction of or damage to such property by any other peril hereby insured against be collectively of greater value than such sum insured, then the insured shall be considered as being his own insurer for the difference and shall bear a rateable share of the loss accordingly.

2. But if any of the property included in such average shall, at the breaking out of any fire, or at the commencement of any destruction of or damage to such property by any other peril hereby insured against, be also covered by any other more specific insurance, i.e. by an insurance which at the time of such fire or at the commencement of such destruction or damage applies to part only of the property actually at risk and protected by this Insurance and to no other property whatsoever, then this Policy shall not insure the same except only as regards any excess of value beyond the amount of such more Specific Insurance, or Insurances, which said excess is declared to be under the protection of this Policy and subject to Average as aforesaid.

In spite of the fact that after its introduction the revised wording did not always meet adequately every case, no further alteration has been made, and the practice adopted for apportionments has, over the years, become so well understood that few, if any, difficulties arise today in its application. The growing method of insuring property on a floating basis only, subject to *pro rata* average, has resulted in a decline in the number of cases involving property insured both specifically and on a floating basis, and apportionments bringing into play the two conditions of average are today comparatively few.

The first of the so-called "*two conditions of average*" is the ordinary *pro rata* condition, which has already been considered. The second is not an average condition, but a contribution clause coming into operation if and when the more specific insurances fail to give an indemnity. Briefly, it provides as follows—

(*a*) if I am *not* the only policy covering the property I am said to insure—and

(*b*) if any of the other policy or policies cover in the same interest only *part* of this property (or in other words is/are more specific) and no other property then

(*c*) this other policy or these other policies will pay up to the limits of their liability first of all, and, if necessary,

(*d*) I will try to pay what is left although *pro rata* average may operate to reduce this figure.

This is solely an attempt to put the facts simply, but it does bring out the salient features. There must be at least two policies, one of which has to be more specific than the other, and once these circumstances are present, the second condition (if in the policy) will operate, if necessary, in the event of loss.

This second condition is best further explained by breaking it down into several component parts and will be so considered in a simple example.

Policy A covers stock in warehouse I for £1,000, subject to *pro rata* average.

Policy B covers stock in warehouses I and II for £5,000, subject to the two conditions of average.

The values at risk at the time of the fire were £2,000 in warehouse I and £4,000 in warehouse II. There was a loss of £1,500 in warehouse I.

These particulars would be tabulated as follows—

	Insurances			
Warehouse	A	B	*Value at risk*	*Loss*
I	A £1,000	2 £5,000	£2,000	£1,500
II	—		£4,000	—

(The "A" over A's sum insured means that it is subject to *pro rata* average, and the "2" over B's sum insured that it is subject to the two conditions of average. These signs are used in all examples.)

The liability of policy A is straightforward, being $\frac{1000}{2000} \times$ £1,500 = £750, and this amount would be paid, leaving a balance of £750. Policy B now steps in and brings into operation the *second* condition, but policy B is itself subject to the first or *pro rata* average condition.

Wording of second condition	*Application to example*
(i) But if any of the property included in such average	i.e. Stock in Warehouses I and II.
(ii) shall . . . be also covered by any other more specific insurance, i.e. by an insurance which at the time . . . applies to part only of the property	Policy A applies solely to warehouse I, i.e. "part only" and is therefore more specific.
(iii) actually at risk and protected by this insurance	There is property actually at risk in both warehouses.
(iv) and to no other property whatsoever	Policy A does not apply to any other warehouse.
(v) then this policy (viz. policy B) shall not insure the same except only as regards any excess of value beyond the amount of such more specific insurance	Total value is £6,000. More specific policy A is for £1,000 and excess of value is therefore £5,000.
(vi) which said excess is declared to be under the protection of this policy	Policy B is therefore held to protect £5,000.
(vii) and subject to average as aforesaid	As the excess value is £5,000 and the sum insured by Policy B is £5,000, the fraction for the purposes of applying average is $\frac{5000}{5000}$, i.e. unity, so policy B becomes liable for the balance of £750.

Although apportionments involving policies subject to the two conditions of average are considered in more detail in Chapter 8, it is apparent from this example that to interpret correctly the liability of an insurance subject to the two conditions the following questions must be answered—

(i) Are there any other insurances on any part of the property covered?

(ii) If there are, can it be established that they are more specific? That is—

(*a*) That they cover only *part* of the property;

(*b*) That they cover no *other* property;

(*c*) That all the property covered (by all policies concerned) is *actually at risk*. Thus if, for example, there is no property at risk at a particular situation, that situation is deleted from the relative policy and its range lessened or narrowed. It therefore becomes more specific than it was before, but not necessarily more specific in relation to other policies which may be called into contribution.[1]

(iii) If it is established that the other insurances *are* more specific, are their sums insured sufficient to cover the value of the property damaged or destroyed?

(iv) If not, and there is consequently an excess of value not covered by the more specific policies, can the wider-ranged policy meet the balance in full or will average apply to reduce it?

It was originally intended that the two conditions of average should be confined to mercantile or other selected types of risks where rules could be laid down to prohibit "technical" extensions of range, and so prevent *inter alia* complicated apportionments. As time went on, however, it became necessary to allow the use of this form of average to apply to any floating insurances on property also specifically insured, but to ensure uniformity of wording and range, appropriate warranties were inserted in such policies. Two forms of such warranties are used—

(i) Applicable to policies containing both specific and floating policies—

> It is warranted and made a condition of this policy that every other insurance on property described in any item of this policy is and shall be identical in wording with such items.

(ii) Applicable to floating policies—

> It is warranted and made a condition of this policy that—
> (*a*) every other insurance on the property herein described is and shall be identical in wording with this policy.
> (*b*) such property is also specifically insured and
> (*c*) all specific insurances on any one and the same part of the property herein described are and shall be identical in wording with each other.

The effect of applying these warranties means that in the event of loss no liability attaches to the relative insurer if they should be breached.

Finally if, in the event of loss, it is necessary to bring into play an item subject to the two conditions of average, by the importation of average condition (see p. 134) *pro rata* average will be imported into the specific items if they are not already so subject. Where both specific and floating items form part of the same policy, it is not generally

[1]As explained on p. 138 the term "more specific" can also apply to *property* insured.

intended to import average in this way, and this is overcome by including in the policy (if the insurer so wishes) the following memorandum—

> Notwithstanding anything to the contrary in the conditions of this policy, it is hereby agreed that no item hereof shall be made subject to average in consequence only of the fact that some other insurance of wider range is subject to average.

CHAPTER 8

CONTRIBUTION IN PRACTICE

NOWADAYS contribution, i.e. the sharing of losses between two or more policies, is comparatively rare, with the exception of what are called "trust and extension apportionments." These concern insurances on property in trust on premises, for example laundries, shops, or workrooms where repairs are carried out. Often this property is also covered under an extension clause under policies effected by the owners of such property, and, since two insurances are in force covering the same property, contribution applies, not legally, but in accordance with the arrangement made between most insurers. Trust and extension apportionments are dealt with in Chapter 9.

There are various reasons for the marked decline in the number of losses where contribution operates.

1. It is customary practice today for most people or small firms to place their business with one insurer.

2. If the insurance is shared between two or more insurers, it is generally scheduled, i.e. shared on a percentage basis, each insurer taking a specified percentage of the whole.

3. The tendency at the present time is for insurances covering *stock* to be insured in one amount only on a floating basis, subject to *pro rata* average.

In spite of the foregoing, occasions still arise when it is found that property is covered by more than one policy or insurer, and the methods today used to apportion losses arising in such circumstances must therefore be understood, so that they can be applied to any case under consideration.

Before these methods are explained the meaning of the following terms must be known, because they will be used frequently.

Policy—The term "policy" in relation to apportionments is held to relate to *a single item* (and consequently a single sum insured) whether the whole or only part of the insurance is covered in the one document.

Average policy—This is a policy subject to the *pro rata* condition of average.

Non-average policy—This is a policy free from any conditions of average whatever.

Concurrent—Policies are said to be concurrent when—

(i) They cover only the same property or classes of property;
(ii) They apply only to the same situation or situations;

(iii) None of them includes property which others do not cover nor extends to any risk to which the remainder do not apply;
(iv) They do not contain any specific provision which would prevent them from ranking uniformly in their practical application.

Example—

Policy A insures household goods in a house for £500.
Policy B insures household goods in the same house for £250.
Both policies are subject to the same terms and conditions.

Concurrent policies can all be free of average, or can all be subject to the same condition of average, or some can be subject to average and others not. Apportionments involving concurrent policies which fall into the last category can be complicated by the importation of average into the non-average policies if under-insurance is present.

Non-concurrent—Policies are said to be non-concurrent when—
(i) Although there must be some property common to all policies,
(ii) Some apply to—
(*a*) part only of the property covered by the others or
(*b*) property not covered by the others.

Example—

Policy A covers stock and fixtures.
,, B ,, ,, only.
,, C ,, ,, and utensils.
Stock is common to all three policies. This is the essential feature.

Non-concurrent policies can all be free from average, can all be subject to the same or different forms of average, or some can be subject to average and others not. The non-concurrency can also apply to situations or both to property and situations, provided always that the policies concerned have *something* in common.

Where there is plurality of risk, average in some form usually applies.

In addition to the foregoing, two general and very important features must be emphasized—

1. *Position of insured.* Whatever method of apportionment is used as between one insurer and another, the insured must not suffer thereby. Provided, therefore that an insured has in force non-average policies to cover the agreed loss, he must, subject to any particular provisions in his policies to the contrary, recover his loss in full. For this reason a compromise apportionment may be necessary if the normal method or methods do not give the insured an indemnity. Under policies subject to average an insured must be given the benefit of that apportionment which results in the most advantageous settlement to him, and, here again, some form of compromise may be necessary.

2. *Sum insured reduced by payment of loss.* It must be emphasized again that the sum insured by a policy (as defined above) stands reduced by the amount paid for a loss until the ensuing renewal date, *unless the amount of such loss is reinstated* by endorsement and an additional premium paid. The reinstatement can be effected immediately, i.e. from the date when the loss took place or subsequently. The importance of this will be grasped if it is necessary to deal with the apportionment of a second or subsequent loss during any one insurance year. In the absence of reinstatement of the sum insured, only the balance can be brought into contribution.

CONCURRENT POLICIES

1. None Subject to Average

When the contribution condition of the standard policy (p. 133) was considered, it was indicated that the word "rateable" had never been defined and that its meaning could differ according to the circumstances in which contribution arose. Under concurrent non-average policies it is generally agreed that "rateable" refers to *sums insured*, and apportionments are therefore simple.

Example. Stock covered by Policies A and B for £1,000 and £2,000 respectively is damaged to the extent of £600. With the apportionment set out in the usual way, it will be seen that A pays £200 and B £400.

Insurances		*Loss*	*Apportionment*		
A	B		A	B	Total
£1,000	£2,000	£600	£200	£400	£600

The liabilities of A and B are 1,000 : 2,000 or, as more commonly expressed, A is liable for $\frac{1000}{3000}$ × the loss, and B for $\frac{2000}{3000}$ × the loss. Whatever the amount of the loss, these proportions will remain constant, the only limitation being the sums insured. If, therefore, the loss exceeds the total insured by both policies, each is liable only for its sum insured and no more. The insured is then said to be under-insured, and must himself bear the difference between the loss and the total amount of his insurance. No policy is subject to average, and therefore—

1. Values at risk do not enter into the calculations at all, and consequently

2. Each policy is liable up to its sum insured, whatever the values at risk.

However many policies are concerned, it will be found that any loss or losses can be apportioned by this method.

2. All Subject to Pro Rata Average

Since average, in whatever form, introduces an additional requirement, namely, a knowledge of the value of the property at risk at the

time of the loss, it is usually not possible to use sums insured as a basis upon which to work out an apportionment. Sums insured can be used in this way only when, having ascertained the value at risk, it is found that average does not apply to any of the policies involved, and the method used for concurrent non-average policies can be adopted.

Independent Liability

Even with a full insurance over all, average may almost certainly apply to the individual policies themselves, and as sums insured cannot then be used another method must be found. With the use of the previous example and on the assumption that the value of stock is £3,000 at the time of the fire, the following position arises—

			£
Policy A is liable for	$\frac{1,000}{3,000} \times$ loss, viz. £600	=	200
,, B ,, ,, ,,	$\frac{2,000}{3,000} \times$ loss, viz. £600	=	400
		Total	600

Therefore, Policy A pays £200 and Policy B pays £400 — the same result as if neither policy had been subject to average. This will always be so where the value at risk is equal to or less than the aggregate sums insured, in the absence of any other particular provisions to the contrary.

If a value at risk of £4,000 be assumed, the position becomes as follows—

				£
Policy A is liable for	$\frac{1,000}{4,000} \times$ £600	=	£150 and pays	150
,, B ,, ,, ,,	$\frac{2,000}{4,000} \times$ £600	=	£300 ,, ,,	300
			Total	450

The insured, therefore, loses £150, which is reasonable, since he has insurances for only 75 per cent of the total value at risk.

If the value at risk is less than the aggregate sums insured, the individual liabilities of the respective policies will together be greater than the amount of the loss and must therefore be proportionately reduced.

With the foregoing example, but applying a value of £2,000—

Policy A is liable for	$\frac{1,000}{2,000} \times$ £600	=	£300
,, B ,, ,, ,,	$\frac{2,000}{2,000} \times$ £600	=	£600

There are thus total liabilities of £900 compared with a loss of £600, and a proportionate reduction must therefore be made.

Policy A pays $\frac{300}{900} \times £600 = £200$

" B " $\frac{600}{900} \times £600 = £400$

The example would properly be set out in full as follows—

Insurances A	B	*Value*	*Loss*
£1,000	£2,000	£2,000	£600

A's liability $\frac{1{,}000}{2{,}000} \times £600 = £300$ to pay £200

B's " $\frac{2{,}000}{2{,}000} \times £600 = £600$ " " £400

	£
A pays	200
B "	400
	600

It will be noticed that the liability of Policy B is the amount of the loss, and this will always be so where the individual sum insured under a policy is equal to or greater than the total value at risk. The liability of an insurer under an average policy can never be *more* than the loss.

Example—Sum insured £5,000 subject to average. Value at risk £3,000.

Liability is— $\frac{\text{Sum insured}}{\text{Value at risk}} = £\frac{5000}{3000}$ but not greater than unity.

In theory, the sum insured is reduced to the value so that the fraction becomes $\frac{3000}{3000}$.

Since the liability of each office has to be ascertained independently of the other, this method is called the "Independent Liability Method" and is used for all apportionments involving policies subject to any condition of average. In such circumstances, therefore, the term "rateable" is interpreted to mean the liabilities of the insurers independently assessed.

3. All Subject to the Special (75 per cent) Condition of Average

Since under the special condition of average the insured is not penalized unless the sum insured is less than 75 per cent of the total value at risk (when ordinary *pro rata* average applies) it is only fair to group all the policies which are the subject of contribution into one amount to see if, over all, they are adequate, i.e. they are equal to or more than the value at risk. An example will make this clear.

	£
Policy A covers agricultural produce for	1,000
„ B „ „ „ „	1,500
„ C „ „ „ „	2,000
Total insurance	4,500

The value at risk at the time of fire £6,000.

Although each policy, taken separately, is for a sum insured less than 75 per cent, namely, £4,500, of the value at risk, the sums insured collectively are *not* less than this figure. In these circumstances, it would be unreasonable to penalize the insured, and where, therefore, the aggregate sums insured under concurrent policies are equal to or greater than 75 per cent of the total value at risk, *pro rata* average is not applied, so that the loss is apportioned on the basis of sums insured.

If the aggregate sums insured are less than 75 per cent of the value at risk, then the provisions of the condition come into operation and *pro rata* average applies.

Example—

	£
Policy A covers agricultural produce for	1,000
„ B „ „ „ „	1,500
„ C „ „ „ „	2,000
Total insurance	4,500

Value at risk at time of fire £8,000.

The aggregate sum insured of £4,500 is less than 75 per cent, namely, £6,000, of the value at risk, so *pro rata* average applies in respect of each policy.

$$\left.\begin{array}{ll} \text{Policy A is liable for} & \frac{1,000}{8,000} \\ \text{,, B ,, ,, ,,} & \frac{1,500}{8,000} \\ \text{,, C ,, ,, ,,} & \frac{2,000}{8,000} \\ \text{The insured loses} & \frac{3,500}{8,000} \end{array}\right\} \times \text{loss}$$

Apportionments involving conditions of average incorporating a different percentage, for example 80 per cent or 50 per cent, are dealt with on a similar basis.

4. Some Subject to Average, Others Not

In the definition of concurrent policies it was said that where *some* of the policies concerned are subject to average and others are not, complications arise from the importation of average. The questionable

legality of importing average into an otherwise non-average policy has already been considered, and apportionments which, by importing average in this way, result in part of the loss falling upon the insured must be given particularly careful consideration. It is doubtful if, in practice, apportionments of this kind arise today on any but the odd occasion, but, if they do, every effort must be made by the insurers to see that the insured does not suffer unduly. This is particularly important where one subject only is covered by, say, two policies, one only of which is subject to average. It has already been shown that if the original policy effected is free of average and the additional policy subject to average, the very fact of taking out the second policy could penalize the insured in the event of under-insurance in spite of his increasing the overall cover. A further example will make this clear—

Policy A covers stock for £1,000 free of average. With a loss of £500, the amount is paid in full. If the insured, however, effects a second Policy B for £500, subject to average, the total amount recoverable, assuming the same loss of £500 and a value at risk of £3,000, would only be £250. Policy A would import average and an apportionment would be made on the independent liability principle as follows—

Insurances		*Loss*	*Value*	*Liabilities*		*To Pay*	
A	B(*A*)			A	B	A	B
£	£	£	£	£	£	£	£
1,000	500	500	3,000	167	83	167	83
			(imports average from B)			Insured loses £250	

It is true that there is considerable under-insurance, but it is equally true that Policy A would have paid the loss in full if Policy B had not been taken out. This is probably an extreme case and would be unlikely to occur in practice, but it does illustrate the difficulties which can arise if, in such circumstances, the condition were to be strictly enforced.

If contribution ever does arise between policies some free of and some subject to average, it may be necessary for some compromised form of apportionment to be adopted where under-insurance is present. In this way the insured is given a full or as complete an indemnity as is possible, bearing in mind the insurances he has effected and the particular circumstances. For example, it may be agreed that the non-average policy, in addition to its liability as assessed (i.e. following the importation of average), pays the amount the insured "loses" subject to the total payment not exceeding the sum insured.

Thus, with the above example, the £250 lost by the insured can be added to Policy A, when Policy A pays £250 plus £167 = £417. Policy B paying £83 as before. The result may seem unfair to Policy A,

but it is often difficult to find any apportionment which is not unfair to either policy in one way or another.

NON-CONCURRENT POLICIES

1. None Subject to Average

As earlier defined, non-concurrent policies must have *something* in common. A simple example of two non-concurrent policies is—

Policy A covers stock.
,, B ,, ,, and fittings.

Stock is common to both policies, but Policy A applies to part only of the property covered by B. Such an arrangement of insurances is usually shown as

Subject matter or Risk	*Insurances* A	B
I. Stock	X	X
II. Fittings	—	

The method by which contribution is applied depends on whether (*a*) one only or (*b*) more than one subject-matter or risk is the subject of the claim.

(*a*) WHERE ONE SUBJECT-MATTER ONLY IS CONCERNED

As Policy B covers both stock and fittings, its sum insured can be applied to either, up to its limit. If the loss is in respect of fittings only, Policy A has no interest, and Policy B must meet the loss in full, subject only to its sum insured not being exceeded. If the loss is in respect of stock only, Policy B is liable, if alone, to meet the loss in full, again to the limit of its sum insured. This being so its contribution to any loss on the common subject-matter, in this instance stock, is based on its sum insured, notwithstanding the fact that it covers other property as well.

Examples—

		Insurances A	B	*Loss*
		£	£	£
(1)	Stock	1,000	1,500	—
	Fittings	—		500

Policy B pays the loss of £500 in full. Policy A is not concerned because it does not cover fittings.

		Insurances A	B	*Loss*
		£	£	£
(2)	Stock	1,000	1,500	500
	Fittings	—		—

Here both policies are liable; each, if necessary, up to its sum insured. The loss of £500 is therefore apportioned on *sums insured*, i.e. as though the two policies were concurrent.

		£
Thus Policy A pays	$\frac{1,000}{2,500} \times £500 =$	200
,, B ,,	$\frac{1,500}{2,500} \times £500 =$	300
		500

(*b*) Where More Than One Subject-matter is Concerned

With the previous example, but on the assumption of losses of £1,500 on stock and £500 on fittings, the position then becomes—

	Insurances A £	*Insurances* B £	*Loss* £
Stock	1,000	1,500 (Stock and Fittings)	1,500
Fittings	—		500

Towards the end of the last century there was considerable argument as to how such losses should be apportioned. Advantages could accrue to the respective insurers according to the way in which the apportionment is worked out. If the larger loss were taken first one insurer would be in a better position than the other and vice versa. There was also the position of the insured to be considered. One way he might get a full recovery, whereas in another way he might not. The problem was finally resolved by a compromise, namely, both apportionments were to be made, i.e. one starting with the larger (or largest if there were losses in three or more subject-matters) loss first, the other with the smaller (or smallest) loss first. The two results were to be aggregated, the average or mean taken, and the insurers would pay on this basis. If either working resulted in part of the loss falling on the insured, that particular working would be abandoned.

MEAN METHOD

This method, known as the "Mean Method" was adopted and has since been used for the apportionment of non-concurrent non-average policies for losses involving two or more subject-matters. The basic principle is that the wider-ranged policy or policies shall be reduced in stages by the amount or amounts "paid" for the respective subject-matters. In the preceding example, B is liable first of all to contribute

to the loss on stock, and, once the amount payable is ascertained, *that figure is deducted from the sum insured, leaving the balance to contribute to the loss on fittings.* The reverse procedure is then adopted and the "mean" taken. The working out is as follows—

	Subject-matter	*Insurances* A	*Insurances* B	*Loss*	*To Pay* A	*To Pay* B
		£	£	£	£	£
Larger loss first	I. Stock	1,000	1,500	1,500	600	900
	II. Fittings	—	600 (i.e. 1,500 less 900)	500	—	500
Smaller loss first	II. Fittings	—	1,500	500	—	500
	I. Stock	1,000	1,000 (i.e. 1,500 less 500)	1,500	750	750
				Aggregate	1,350	2,650
				Mean	675	1,325

Thus A pays on Stock £1,350 ÷ 2 675
B „ „ „ £1,650 ÷ 2 = 825
B „ „ Fittings £1,000 ÷ 2 = 500 1,325
2,000

If there are losses in three or more subject-matters, the same rule is applied. The sum insured by the wider-ranged policy is reduced *each time* by the relative amount paid, the balance being carried down to meet the next loss. Two workings only are made.

Example.[1] Policy A insures stock for £500, fixtures and fittings £300 and plate glass £50. Policy B insures stock for £300 and fixtures, fittings and plate glass for £200. Policy C insures stock, fixtures, fittings and plate glass for £500. Apportion losses of £1,000 on stock, £250 on fixtures and fittings and £100 on plate glass.

The normal method of setting out the apportionment is as follows—

	Subject-matter	*Insurances* A	B	C	*Loss*	*Liabilities* A	B	C	*To Pay* A	B	C
		£	£	£	£	£	£	£	£	£	£
Largest loss first	I. Stock	500	300	500 (I–III)	1,000	500	300	500	385	231	384
	II. Fixtures, etc.	300	200 (II–III)		250	300	200	116 (i.e. 500 −384)	122	81	47
	III. Plate Glass	50			100	50	119 (i.e. 200−81)	69 (i.e. 116−47)	21	50	29
								Total	528	362	460

[1]C.I.I. Examinations, 1955.

	Subject-matter	*Insurances* A	B	C	*Loss*	*Liabilities* A	B	C	*To Pay* A	B	C
		£	£	£	£	£	£	£	£	£	£
Smallest loss first	III. Plate Glass	50	200	500	100	50	200	500	7	27	66
	II. Fixtures, etc.	300			250	300	173 (i.e. 200−27)	434 (i.e. 500−66)	83	48	119
	I. Stock	500	300		1,000	500	300	315 (i.e. 434−119)	448	269	283
								Total	538	344	468
								Aggregate	1,066	706	928
								Mean	533	353	464

		£
Thus Policy A pays		533
,, B ,,		353
,, C ,,		464
		1,350

The next example shows the abandonment of one working which throws part of the loss on the insured.

Example.[1] Policy A insures grain for £1,000 and flour for £500. Policy B insures grain and flour in one amount of £1,500. Apportion a loss of £1,500 on grain and £1,200 on flour.

	Subject-matter	*Insurances* A	B	*Loss*	*Liabilities* A	B	*To Pay* A	B
		£	£	£	£	£	£	£
Larger loss first	I. Grain	1,000	1,500	1,500	1,000	1,500	600	900
	II. Flour	500		1,200	500	600 (i.e. 1,500−900)	500	600
							Insured loses £100	

	Subject-matter	*Insurances* A	B	*Loss*	*Liabilities* A	B	*To Pay* A	B
		£	£	£	£	£	£	£
Smaller loss first	Flour	500	1,500	1,200	500	1,500	300	900
	Grain	1,000		1,500	1,000	600 (i.e. (1,500−900)	937	563

[1]C.I.I. Examinations, 1957.

The first working is abandoned (as part of the loss is thrown on to the insured) and the second only adopted. Thus A pays £1,237 and B £1,463.

Where the sums insured together are sufficient to meet the whole loss, then if both workings throw part of the loss on to the insured—

1. An alternative method, i.e. independent liability must be tried to see if this gives a full indemnity, or, if not,
2. A compromise must be found.

The insured must receive payment of his loss in full if the overall sums insured are adequate.

Where the sums insured together are *not* sufficient to meet the whole loss, that working which throws the smaller (or smallest) loss on the insured must be adopted.

2. All Subject to the Pro Rata Condition of Average

The independent liability method is used and normally there are no difficulties.

Example.[1] Stock-in-trade and fixtures and fittings in two warehouses are insured as follows—

(*a*) Stock-in-trade and fixtures and fittings in Warehouses I and II with Office A for £2,000 subject to average.

(*b*) Stock-in-trade only in Warehouses I and II with Office B for £2,000 subject to average.

(*c*) Stock-in-trade only in Warehouse I with Office C for £1,000 subject to average.

There is a loss in Warehouse I of £2,500 stock-in-trade and £500 fixtures and fittings, the relative values at risk at the time of loss being—

	£
Stock-in-trade in Warehouse I	4,000
,, ,, ,, II	2,000
Fixtures and fittings in Warehouse I ..	500
,, ,, ,, II ..	500

Apportion the loss.

TABULATION—

Subject-matter	Insurances A £	Insurances B £	Insurances C £	*Values* £	*Loss* £
Warehouse I. Fixtures	*A* 2,000 (Fixtures I, Stock I, Stock II, Fixtures II)	—	*A*	500	500
,, I. Stock		*A* 2,000 (Stock I, Stock II)	1,000	4,000	2,500
,, II. Stock			—	2,000	—
,, II. Fixtures		—	—	500	—

[1]C.I.I. Examinations, 1957.

Subject-matter	*Insurances* A	B	C	*Values*	*Loss*
	£	£	£	£	£
Stock-in-Trade					

			£
A's liability is $\frac{2,000}{7,000} \times £2,500 = £714$		pays	714
B's liability is $\frac{2,000}{6,000} \times £2,500 = £833$		,,	833
C's liability is $\frac{1,000}{4,000} \times £2,500 = £625$		,,	625
	Insured loses		328
			2,500

Fixtures and Fittings

	£
A only liable for .. .. .. $\frac{2}{7} \times £500 =$	143
Insured loses	357
	500

3. All Subject to the Special (75 per cent) Condition of Average

Here again, the independent liability method is used. Apportionments in this category are today rare, but do occasionally occur.

Example. Office A insures agricultural produce (including wheat) for £5,000. Office B insures wheat for £1,000. Each sum insured is subject to the special condition of average. Apportion a loss of £1,600 on wheat, the values at risk at the time of the fire being £8,000 on agricultural produce (including wheat) and £2,000 on wheat alone.

TABULATION—

Subject-matter	*Insurances* A	B	*Values*	*Loss*
	£	£	£	£
I. Agricultural Produce	75%[1] 5,000	—	8,000 (including wheat)	—
II. Wheat		75% 1,000	2,000	1,600

In each instance the sum insured is less than 75 per cent of the value at risk so *pro rata* average applies.

		£
A's liability is $\frac{5,000}{8,000} \times £1,600 = £1,000$	pays	889
B's liability is $\frac{1,000}{2,000} \times £1,600 = £800$	,,	711
		1,600

[1]This indicates that the sum insured is subject to the special (or 75 per cent) condition of average.

If any sum insured in apportionments of this kind equals or exceeds 75 per cent of the relative value, the sum insured is taken as the liability, for average does not then apply. Thus in this example if policy B's sum insured had been £1,500, the special condition of average would not have applied and Policy B's liability in the apportionment would have been £1,500.

4. Some Subject to Average, Others Not

In the consideration of such policies when concurrent, it was stated that the non-average policy might have to help to make up the deficiency produced as a result of importing average.

If, however, the policy subject to average is made so solely because it covers a plurality of risks, the majority of insurers have agreed among themselves that this procedure (viz. that the balance, if any, not paid by the average policy is made good by the non-average policy up to the limit of its sum insured) shall be adopted in practice. The independent liability method is used in apportioning losses where such policies are concerned.

Example—

Subject	*Insurances* A	*Insurances* B	*Value*	*Loss*	*Liabilities* A	*Liabilities* B	*To Pay* A	*To Pay* B
	£	£	£	£	£	£	£	£
I.	500	*A*	1,000	500	250	167	250	167
II.	—	1,000	2,000	—		—	Insured loses £83	

Policy A is not itself subject to average, but imports average from Policy B, and, as a result, the insured loses £83. By the arrangement referred to this sum of £83 is added to Policy A's payment of £250 making a total payment of £333.

			£
Thus Policy A pays	£250 + £83	=	333
„ B „	£167		167
			500

The same procedure in adopted if there are losses in two or more subjects.

Example—

Subject	*Insurances* A	*Insurances* B	*Value*	*Loss*	*Liabilities* A	*Liabilities* B	*To Pay* A	*To Pay* B
	£	£	£	£	£	£	£	£
I.	500		1,000	500	250	167	250	167
		A				Insured loses		£83
II.	—	1,000	2,000	500	—	167	—	167
						Insured loses £333		

If average had not been imported Policy A's liability on subject I would have been £500, and Policy B's liability £167, A paying £369 and B £131. A would therefore pay the £83 in addition to the amount of £250, making a total payment of £333, B paying £167 as before. The amount of £167 paid by B in respect of II stands unaltered.

The following details are taken from an actual loss—

Policy A covers potatoes in a single farm building for £800.
,, B covers agricultural produce (including potatoes) anywhere on the farm for £1,500, subject to the special condition of average.

	£
Loss on potatoes	1,342
,, ,, other produce	33
	1,375

Value at time of fire— potatoes £1,810; all produce £2,807.

TABULATION—

Subject	*Insurances* A	*Insurances* B	*Value*	*Loss*
	£	£	£	£
1. Agricultural Produce (excluding potatoes)	—	75%	997	33
2. Potatoes	800	1,500	1,810	1,342

The special condition of average operates in respect of the sum insured of Policy B, and average is imported into the sum insured of Policy A.

		£
The liability of A is therefore	$\frac{800}{1,810} \times £1,342 =$	593
,, ,, ,, B ,, ,,	$\frac{1,500}{2,807} \times £1,375 =$	735
		1,328
	Balance of loss	47
		1,375

Blanket Policies. Where contribution arises under the terms of the agreement outlined in Chapter 7, p. 133, it has been agreed that if apportionments involving "blanket" policies are concerned, the losses shall be apportioned on the basis of independent liabilities.

APPORTIONMENTS INVOLVING THE TWO CONDITIONS OF AVERAGE

The basic principles of the two conditions of average were explained on pp. 137-44, and a number of apportionments are considered later in this chapter to show in more detail the working of the second condition.

It is unlikely that insurers will ever again be faced with the extremely complicated apportionments that were once necessitated by the large riverside or port fires involving merchandise in warehouses. In those days—perhaps up to some thirty years ago—policies were regularly being taken out on parcels of merchandise, the policies usually being subject to the two conditions of average. The modern wide floaters, subject to *pro rata* average, particularly if they represent the entire stock of one firm or individual, mean that apportionments are few, and thus so far as the so-called *mercantile* insurances on stock are concerned the two conditions of average have lost much of their previous importance.

Strangely enough, it is now in the industrial field that the two conditions are mostly used. The whole idea of these conditions is to enable an insured who has property at risk in a number of buildings (particularly where the value of such property is likely to fluctuate) to insure this property for reasonable specific amounts and to effect, in addition, a floater, i.e. covering similar property in all the buildings concerned and possibly in the open as well, to act as a reserve in the event of under-insurance in any of the specific items. Such floaters are frequently taken out in respect of plant and machinery which may be transferred from one building to another and yet involve no overall increase in the sum insured. Buildings are sometimes dealt with in the same way, but stock is nearly always covered in one item, floating over all buildings, subject to *pro rata* average and usually on a declaration basis.

When any apportionments involving the two conditions are dealt with, three important rules must be remembered.

1. *Excess of value beyond the amount of such more specific insurance(s).* In ascertaining the excess of value it is necessary to ascertain the total value at risk in the range covered by the wider ranged policy and to deduct therefrom the *value covered* by the more specific policy or policies. If the sum insured by any more specific policy is *less* than the corresponding value, then the actual sum insured is deducted. If the sum insured is *greater* than the value, then the *value* is deducted. In short, deduct the value or the sum insured, *whichever is the smaller.* The example shown overleaf makes this clear.

Subject	*Insurances* A	B	C	*Value*
	£	£	£	
	A	—		£
I.	1,000	*A*	2 *C*	2,000
II.	—	2,000	5,000	1,500
III.	—	—		5,000

C's liability for any loss in any subject is $\dfrac{\text{Sum insured}}{\text{Total Value at risk} - \textit{value covered} \text{ by more specific policies}}$

$$\frac{5{,}000}{(2{,}000 + 1{,}500 + 5{,}000) - (1{,}000 - \text{as A's sum insured is less than the value} + 1{,}500 - \text{as B's sum insured is greater than the value})}$$

$$\text{or } \frac{5{,}000}{8{,}500 - 2{,}500} = 5/6\text{ths}$$

The excess of value can also be calculated by merely adding up the values not covered by the more specific policies. In the above example—

(*a*) the value not covered by A in I is £1,000 (i.e. £2,000 – £1,000);

(*b*) no value is uncovered by B in II, since B's sum insured is greater than the value;

(*c*) the value not covered in III is £5,000, since there is no specific policy.

The excess of value not covered is therefore £1,000 + £5,000 = £6,000, the same figure as that produced before. Either method can be used or both, one acting as a check on the other.

This leads to the second rule.

2. Once the liability of a floater has been established, *it remains constant* for all losses within its range. In the previous example, C would pay 5/6ths of any loss in any subject not covered by the specific insurances.

3. If there is nothing whatever at risk in one or more of the subjects (or situations) embraced by the floater, its range must be reduced accordingly. For example, if a floater subject to the two conditions refers to stock in five warehouses and at the time of the fire there is nothing at risk in two of the warehouses, the range of the floater is reduced so that it applies to the three remaining warehouses only. The range of a policy, however, is *not* reduced, because part is fully covered by a more specific policy.

The following examples of apportionments are all taken from recent C.I.I. examination papers.

Example.[1] A firm has stock-in-trade in four adjoining warehouses, and has arranged insurances as follows—

[1]C.I.I. examinations, 1955.

Office A £5,000 in Warehouses I and II subject to average
,, B £5,000 ,, ,, II and III ,, ,, ,,
£2,000 ,, Warehouse IV (non-average)
,, C £10,000 in all four warehouses subject to the two conditions of average.

As the result of a serious fire Warehouses III and IV are gutted (there being no salvage) and damage to the extent of £500 and £1,000 is caused to the stock in Warehouses I and II respectively. At the time of the fire the values at risk were—

		£
Warehouse I	..	5,000
,, II	..	10,000
,, III	..	5,000
,, IV	..	3,000

Apportion the loss in the customary manner.

The first step is to tabulate the figures.

Warehouse	*Insurances*			*Value*	*Loss*
	A	B	C	£	£
I.	*A*	—		5,000	500
II.	£5,000	*A*	2 *C/A*	10,000	1,000
III.	—	£5,000	£10,000	5,000	5,000
IV.	—	£2,000		3,000	3,000

Loss in I—

A is more specific than C, and being subject to *pro rata* average its liability is $\frac{5000}{15000}$ or $\frac{1}{3}$ × £500 = £167 ∴ A pays £167
leaving a balance of £333.

B is not concerned with the loss in I.

C extends to I and is of wider range than A. The provisions of the second condition apply and C's liability is

$$\frac{10{,}000}{23{,}000 - 12{,}000} = \frac{10}{11} \times £333 = \text{(and pays) } £303$$

(total value) (value covered by more specific policies) (balance not covered)

Insured loses £30

Remember that C's proportion of $\frac{10}{11}$ remains constant.

Loss in II—

A and B are both more specific than C but are themselves of independent range.

A's liability is again $\frac{1}{3}$ of £1,000 .. .. .. and pays £333
B's ,, ,, $\frac{5000}{15000}$ i.e. $\frac{1}{3}$ of £1,000 .. .. ,, ,, £333
leaving a balance of £334.
C pays $\frac{10}{11}$ × £334 .. .. £303
Insured loses £31

Loss in III—

A is not concerned with the loss in III
B's liability as before is $\frac{1}{3}$ × £5,000 .. .. and pays £1,667
leaving a balance of £3,333.
C's liability is $\frac{10}{11}$ × £3,333 .. .. .. ,, ,, £3,030
Insured loses £303

Loss in IV—

A again is not concerned with the loss in IV

B's liability is total, i.e. £2,000

leaving a balance of £1,000.

(The importation of average would make no difference as the loss is total.)

C's liability is $\frac{10}{11} \times$ £1,000 .. .. .. and pays £909

Insured loses £91

Summary

				£
A	pays in	I	£167	
A	,, ,,	II	£333	£500
B	,, ,,	II	£333	
B	,, ,,	III	£1,667	
B	,, ,,	IV	£2,000	£4,000
C	,, ,,	I	£303	
C	,, ,,	II	£303	
C	,, ,,	III	£3,030	
C	,, ,,	IV	£909	4,545
Insured	loses in	I	£30	
,,	,, ,,	II	£31	
,,	,,	III	£303	
,,	,, ,,	IV	£91	455
				9,500

This is a straightforward apportionment; there are no complications.

Example.[1] Merchandise in four warehouses is insured with five different offices as follows—

Office A — in Warehouses I and III for £5,000*
,, B — ,, Warehouse II ,, £2,000 (non-average)
,, C — ,, Warehouses I, II, and IV ,, £10,000*
,, D — ,, ,, III and IV ,, £5,000*
,, E — ,, all four Warehouses ,, £20,000*

*Subject to the two conditions of average.

A fire causes damage to the extent of £3,000 in Warehouse II and £10,000 in Warehouse III. At the time of the fire the values at risk are £10,000, £4,000, £30,000 and *Nil* respectively. Apportion the loss.

TABULATION—

Warehouse	A	B	C	D	E	*Values* £	*Loss* £
I	2 *C/A* £5,000 (W'h'ses I and III)	—	2 *C/A* £10,000 (W'h'ses I, II and IV)	—	2 *C/A* £20,000	10,000	—
II		£2,000		—		4,000	3,000
III		—	—	2 *C/A* £5,000		30,000	10,000
IV	—	—				*Nil*	—

Two complications arise here. First, B imports average, and, secondly

[1]C.I.I. examinations, 1956.

the fact that there is nothing at risk in Warehouse IV means that the ranges of all policies extending to this warehouse must be reduced.

A and B are not concerned
C now applies to I and II
D „ „ „ III only
E „ „ „ I, II and III
Therefore A and C are of independent range.
B is of lesser range than C
D „ „ „ „ A
A, B, C and D are all of lesser range than E.

In effect, the tabulation now becomes as follows—

Warehouse	A	B	C	D	E	*Value* £	*Loss* £
I	2 *C/A* £5,000 (I and III only)	—	2 *C/A* £10,000	—	2 *C/A* £20,000	10,000	—
II		£2,000		—		4,000	3,000
III		—	—	2 *C/A* £5,000		30,000	10,000

Loss in II—

A is not concerned with the loss in II

B imports average. Liability is $\frac{2000}{4000} \times$ £3,000 .. and pays £1,500

The second condition operates for C whose liability is

$\frac{10000}{14000 - 2000} = \frac{10000}{12000} \times$ £1,500 „ „ £1,250

leaving a balance of £250

The second condition now operates for E whose liability is

$\frac{20000}{44000 - 22000} = \frac{20}{22} \times$ £250 „ „ £227

Insured loses £23

As B has imported average from a policy covering a plurality of risks it will pay the £23 in addition to its liability of £1,500, making a total payment of £1,523.

Loss in III—

D's liability is $\frac{5000}{30000} \times$ £10,000 and pays £1,667

leaving a balance of £8,333.

(The second condition becomes inoperative since D is now more specific than A or E)

A's liability is $\frac{5000}{40000 - 5000} = \frac{5000}{35000} \times$ £8,333 and pays £1,190

leaving a balance of £7,143.

E's liability (as before) is $\frac{10}{11} \times$ £7,143 .. .. £6,494

The insured loses £649

Since D was already subject to average it does not have to make up the deficiency.

Summary

		£
A pays in III	.. .. ..	1,190
B „ „ II	£1,500 + £23	1,523
C „ „ II	.. .. ..	1,250
D „ „ III	.. .. ..	1,667
E „ „ II	£227	
„ „ III	£6,494 ..	6,721
Insured loses in III	.. ..	649
		13,000

Example.[1] Stock in various warehouses is insured as follows—

Warehouse I	with Office A for	£4,000	subject to average	
Warehouses I and II	,, ,, B ,,	£5,000	,, ,, ,,	
,, II, III and IV	,, ,, C ,,	£8,000	,, ,, the two conditions of average	
,, I to IV inclusive	,, ,, D ,,	£10,000	,, ,, ,, ,, ,, ,,	

Apportion losses of £3,000, £5,000 and £3,000 in Warehouses I, II and III respectively, the values at risk at the time of the loss being—

		£
Warehouse	I	3,000
,,	II	7,000
,,	III	7,000
,,	IV	10,000

TABULATION—

Warehouse	*Insurances* A	B	C	D	*Values* £	*Loss* £
I	*A* £4,000	*A* £5,000	—		3,000	3,000
II	—			2 *C/A*	7,000	5,000
III	—	—	2 *C/A* £8,000	£10,000	7,000	3,000
IV	—	—			10,000	—

Loss in I—

A's liability is the amount of the loss, viz. £3,000	and pays	£2,000
B's ,, ,, $\frac{6000}{10000} \times £3{,}000$ = ... £1,500	,, ,,	£1,000

leaving no balance for D.

(This is a straightforward independent liability apportionment, the joint liabilities exceeding the loss.)

Loss in II—

B's liability is $\frac{1}{2} \times £5{,}000$	and pays	£2,500
C's ,, ,, $\frac{8000}{24000} \times £5{,}000$	,, ,,	£1,667

(the second condition does not operate since B is of independent range)

leaving a balance of £833.

D's liability is $\frac{10000}{27000 - 16000*} = \frac{10}{11} \times 833$	and pays	£757
	Insured loses	£76

(*As A's sum insured is greater than the value.)

Loss in III—

C's liability is $\frac{1}{3} \times £3{,}000$	and pays	£1,000
leaving a balance of £2,000		
D's liability is $\frac{10}{11} \times £2{,}000$	,, ,,	£1,818
	Insured loses	£182

[1]C.I.I. examinations, 1958.

Summary

			£
A pays in	I	..	2,000
B ,, ,,	I	£1,000	
B ,, ,,	II	£2,500	3,500
C ,, ,,	II	£1,667	
C ,, ,,	III	£1,000	2,667
D ,, ,,	II	£757	
D ,, ,,	III	£1,818	2,575
Insured loses in	II	£76	
,, ,, ,,	III	£182	258
			11,000

These three examples should be sufficient to show that any apportionment involving policies subject to the two conditions of average follows a recognized pattern, and provided the three rules set out earlier in the chapter are observed there should be no difficulty in apportioning either hypothetical or actual cases.

CHAPTER 9

APPORTIONMENTS—MISCELLANEOUS FEATURES

In the previous chapter, various methods of apportioning losses were explained. In this chapter, trust and extension and rent apportionments are dealt with and consideration given, *inter alia*, to other features which may arise in connexion with apportionments.

TRUST AND EXTENSION APPORTIONMENTS

Trust apportionments occur when property, in certain circumstances, is insured by two different interests. Legally, therefore, there is no contribution, and it can usually be established which party is primarily liable, but for many years now the majority of insurers have agreed among themselves that contribution shall apply, broadly, where property of others on the premises of one interested party, and insured by that party, is also covered under the extension clauses of policies held by other interested parties.

Examples are as follows—

Premises involved	*Nature of Property insured*	*Extension Clauses*
Shops (particularly where repair work is undertaken); laundries.	Goods in trust	Private house and comprehensive policies.
Hotels, clubs	Personal effects of temporary residents or members.	do.
Schools	Personal effects of pupils.	do.
Trading firms	Personal effects of employees.	do.
Trading firms	Property belonging to other trading firms.	Temporary removal clauses.[1]

In all these examples, legal responsibility may fall on the bailee as the result of negligence, custom of trade, trading arrangements, or by statute, in which event primary liability attaches accordingly. But the responsibility may be moral only, i.e. the bailee may not necessarily have any legal responsibility, although he may nevertheless wish to compensate the owners of property damaged or destroyed while on his premises.[2] Employees' effects on the premises of industrial firms and

[1] See p. 215.

[2] The consent of insurers is normally necessary where an insured wishes to *assume* responsibility (*vide* the agreement).

visitors' effects (specially insured) in private houses come in this category. Whatever the responsibility, however, insurers who are parties to the agreement referred to undertake to share any loss involving property so insured. In other words, the two insurances are regarded as being subsisting. The agreement is worded on the following lines[1]—

> Where an insurance or insurances are expressed to cover property other than property of the insured (hereinafter called "trust insurance") and such property is also included in an insurance, or insurances, subject to various extensions (hereafter called "extension insurance") both insurances shall be deemed as between offices to be "subsisting insurances"[2] and any loss shall be apportioned by ascertaining the total independent liability under the "trust insurance" and the "extension insurance" respectively, without regard to the existence of any other insurance, and determining the contribution of such "trust insurance" and "extension insurance" rateably to their independent liabilities respectively, notwithstanding absence of liability under any policy due to the insertion of any clause restricting the insurance to property for which the insured is responsible or to property not otherwise insured. Effect shall however be given to any *other* limitation in the policy as to the extent of the liability of the insurer.
>
> For the purpose of this agreement it is understood that the "trust insurance" shall be deemed to be the balance of insurance remaining after payment in respect of property upon which no insurance has been effected by the owners and in respect of which the insured is legally liable or has with the consent of his insurers assumed liability. "Property upon which no insurance has been effected" shall be deemed to include insured property to the extent to which it may be under-insured owing to a deficiency of the amount insured by the "extension insurance."

The agreement concludes by stating that—

1. Golfers' policies are to be considered primarily liable, i.e. they are not deemed to be "subsisting insurances", and

2. An insurance covering visitors' effects by a separate item is to be deemed a "trust insurance".

Although not mentioned in the agreement, it is understood, as between offices, that contribution will not be sought from the trust insurer where individual employees' effects are insured under extension insurances and there is also an item covering or extended to include employees' effects in the employer's fire policy, unless the employer's property is also the subject of loss.

This is to prevent the detail work which would arise (particularly if the employer's insurance is shared by a number of insurers) in the event of a loss confined, for example, to the clothing of an employee whilst at his place of work.

As a general rule it can be said that not all property lost or damaged on the bailee's premises is otherwise insured by the owners. It is only fair, therefore, that the trust insurance should first of all be used to

[1]See *Contribution in Fire Insurance*, by H. S. Bell.

[2]See p. 133.

compensate the *uninsured* property owners. There may also be some owners whose extension clauses are inadequate to meet their total losses, i.e. they are under-insured. The trust insurance is next used, therefore, to compensate *under-insured* owners to the extent of their under-insurance. When these two liabilities are known, the balance, if any, of the trust insurance is eligible to rank for contribution with—

(*a*) those who are fully covered by their extension clauses, and

(*b*) those who, although under-insured, are partially covered by their extension clauses,

although any other limitations in the policies concerned must be respected, e.g. limit any one employee.

The independent liability method is used, and the procedure can be summarized as follows—

1. Uninsured losses first.
2. Under-insured losses (i.e. amount of loss in excess of the limit specified by the extension clauses) next.
3. Balance of trust insurance, i.e. original sum insured *less* payments made under (1) and (2) then brought into contribution with extension insurances.
4. Independent liability method of apportionment used.
5. Any other limitations in the policy must be respected.

Some examples of trust apportionments are now considered.

Example.[1] As the result of a serious fire in a radio dealer's saleshop the following losses are sustained by customers—

			£
Customer	A	(Household goods with Office X for £500)	50
,,	B	(,, ,, ,, ,, Y ,, £1,000)	40
,,	C	(,, ,, ,, ,, Z ,, £500)	80
,,	D	Not insured	25
,,	E	,, ,,	25

The owner of the shop has a policy covering *inter alia* goods trust for £500. Apportion the customers' losses.

In accordance with the basis laid down in the agreement, the goods in trust item meets first of all the losses of the uninsured customers D and E, namely, £50. Each of the policies of the remaining customers A, B, and C incorporates an extension clause covering property temporarily removed in the circumstances up to 15 per cent of the respective sums insured, so that the losses of A and B are fully covered thereunder, but C is only covered up to £75 (i.e. 15 per cent of £500). There is thus an under-insured loss of £5, which the trust insurance must next meet before contributing with the other policies. The total initial payments, therefore, made by the trust insurance is £55, leaving a balance of £445. Payments made under the three extension clauses of policies

[1]C.I.I. examinations, 1957.

X, Y, and Z total £165 (i.e. £50 + £40 + £75) so that, on an independent liability basis, the losses are equally shared by the trust insurance and the three other offices concerned.

				Total £
Customer A	— Policy X pays £25	Trust insurance pays	£25	50
,, B	— ,, Y ,, £20	,, ,, ,,	£20	40
,, C	— ,, Z ,, £37 10s.	,, ,, ,,	£37 10s. + £5 £42 10s.	80
,, D	— Uninsured	,, ,, ,,	£25	25
,, E	— Uninsured	,, ,, ,,	£25	25

Summary

		£	s.
Extension insurances pay		82	10
Trust insurance pays — uninsured	£50		
,, ,, ,, — under-insured	£5		
,, ,, contributes with other policies	£82 10s.	137	10
		220	-

Example (*based on an actual loss*). In this loss, which involved the premises of a radio and electric engineer, the total loss on goods in trust amounted to £2,539 against a goods in trust item of £2,000. The total loss was made up of—

	£
Uninsured customers' claims	622
Under-insured customers' claims	416
Payments under extension insurances	1,501
Total ..	2,539

After payment of the claims in respect of the uninsured and under-insured customers, the balance of the trust item ranking for contribution was £962 (namely, £2,000 *less* £1,038). Payments made under extension insurances totalled £1,501, so on an independent liability basis the trust insurance was liable for $\frac{962}{2463}$ and the extension insurances were liable for $\frac{1501}{2463}$ of the total loss paid under the extension insurances. Expressed as a percentage, the trust insurance was liable for 39 per cent approximately, i.e. £585 1s. 9d. of all losses paid under extension clauses. As it is the usual custom for the individual insurers to pay the losses sustained by their policyholders, thereafter recovering from the trust insurers, the latter would, in these circumstances, *refund* 39 per cent of each payment so made. In addition, the adjusters would make a charge for investigating and preparing the apportionment, and this charge, too, would be split in the same proportions, i.e. 39 per cent as

to the trust insurance and 61 per cent to the "extension" insurers. To save detailed work, the amount allocated to the extension insurers is divided by the number of policies involved, so that each refund is reduced by a similar amount. In this example, the adjusters' charges may be assumed to be £15. Sixty-one per cent would be £9 3s., and if 50 extension insurers were involved each would pay 3s. 8d. (four would pay 3s. 7d.) towards the adjusters' charges. The adjusters, in practice, would distribute the agreed contribution on receipt of a remittance from the trust insurers, deducting from each refund a share of their charges.

The method usually adopted by adjusters to set out such an apportionment is shown hereunder—

Office	*Policy No.*	*Insured*	*Extension payment*	*Trust refund* (39%)	*Adjusters' charges* (61%)	*Net refund*
			£ s. d.	£ s. d.	£ s. d.	£ s. d.
A	123	Smith	10 – –	3 18 –	3 8	3 14 4
B	456	Jones	33 10 –	13 1 4	3 8	12 17 8
C	789	Brown	12 – –	4 13 7	3 8	4 9 11
	and so on for all the various policies. The relative columns would be totalled.					
			£1,501 – –	£585 1 9	£9 3 –	£575 18 9

In the insurers' agreement it was stated that other limitations must be respected. It frequently happens that (*a*) the trust insurance incorporates a limit in respect of any one customer's loss, or (*b*) the trade agreement between the firm concerned and its customers incorporates a similar limit, and if this is so the limit must be respected. If the customer is uninsured, the limit is the maximum amount payable. If the customer is insured and the trust share exceeds the limit, the limit only is paid, the balance passing back to the "extension" policy.

On the basis of the last example, the payment made by Office B is £33 10s. If the trust insurance were limited to £10 per customer, the refund to Office B would be £10 *less* the adjuster's charge of 3s. 8d., i.e. £9 16s. 4d. The difference of £3 1s. 4d. would have to be borne by office B.

It will be seen that any limit in the trust policy is applied *after* the normal apportionment has been worked out, and is directly related to payments, not liabilities.

If the goods in trust item is subject to average, the balance to be brought into contribution with the amount paid by the extension insurers may be reduced.

Example—

Sum insured by goods in trust item	£400	subject to average
Value at risk at time of fire	£600	
Losses of uninsured customers	£100	
Payments by extension insurers	£450	

The liability of the trust item in respect of uninsured customers is $\frac{400}{600} \times £100 = £67$, leaving a balance of £333, but as contribution in relation to the extension payments is based on independent liability, the liability of the trust item becomes $\frac{400}{600} \times £450 = £300$, and this figure is taken for the purposes of apportionment, i.e. trust item pays $\frac{300}{750} \times £450 = £180$, and extension insurers pay $\frac{450}{750} \times £450 = £270$.

General Procedure

When he deals with a loss involving a goods in trust item, the adjuster sends a letter to each individual (or firm) who may have had property in the premises involved at the time of the fire and which may have suffered damage. The letters vary according to the particular circumstances, but are often sent in duplicate (particularly to laundries and similar firms) and the following procedure is requested—

1. Particulars furnished of the goods involved, e.g. description and value (after allowance for depreciation). The date of purchase and cost price may also be requested.

2. Name and address of the insurer and the number of the policy if such goods are insured by the owner, and, if so, the owner must notify the insurer at once sending them one copy of the letter duly completed.

3. The return of the other copy similarly completed if the owner is insured or with a declaration to the effect that the owner is uninsured if this is so.

Individuals or firms who are themselves insured are thus instructed to notify their particular insurers, who settle their own insureds' losses and send to the trust policy adjuster (or insurer) details of the payments made, including their own adjuster's fees, if incurred. When the trust policy adjuster has received a note of all the payments made under the extension clauses of the various policies concerned, he makes his apportionment, as already outlined, deducting from each refund a share of his charges for preparing the apportionment.

LIMITS

Many policies incorporate a reference to limits of various kinds. Basically, these limits fall into two categories, viz.—

1. Those applied to particular units, such as certain articles and live-stock. In these circumstances, the limit represents the maximum sum recoverable in respect of any one unit.

Examples—

(*a*) Householders' policies. "No one curio, picture or other work of art, stamp collection, or article of gold, silver, or other precious metal, jewellery or fur, shall be deemed of greater value than 5 per cent of the full value of the contents. . . ."

(*b*) Trade policies. "No one pattern to be deemed of greater value than £25."

(*c*) Farming policies covering livestock. "No one animal in case of loss to be deemed of greater value than £120."

2. Those applied to extensions of cover away from the premises insured, thus limiting losses at other addresses. Here the limit represents the maximum sum recoverable at the situation involved in the loss.

Examples—

(*a*) The 15 per cent limit applicable to the contents of private houses.

(*b*) Contents (other than stock) at trade premises temporarily removed for certain reasons to other premises, subject to a limit of 10 per cent of the sum insured applicable to the item concerned.

(*c*) Contents of firms primarily engaged in metal working while on the premises of certain other firms, subject to a specified maximum liability in respect of—

(i) the extension (e.g. £10,000), and
(ii) any one location (e.g. £1,000).

Contribution in the second category arises under the agreement among offices where property so extended is also covered by the owners or occupiers of the premises at which the extended property is at risk, the common example being trust and extension apportionments. Contribution involving policies in the first category today rarely arises, for reasons given on p. 146; hence the following methods of apportionment, although still applicable, are unlikely to be wanted.

Before these methods are described, however, one feature needs stress. In all the examples given in the first category the emphasis has been placed on a limit of *value* and this is today the general practice. In the event of loss, the insured cannot recover more than this limit, although he may have more than one policy in force covering the same property (assuming, of course, that the limit of value is the same in all policies). If the limits vary in the policies ranking for contribution, the insured can recover up to the higher or highest limits, the other policies contributing (according to their respective liabilities) amounts not exceeding their own respective limits. Some clauses, however, refer to a limit payable in respect of any one article, no mention being made of value. The limit then applies to the actual policy, so that other policies covering the same property also pay up to their named limits.

The method normally chosen for the apportionment of losses on

policies incorporating limits is based on sums insured subject, however, to the resultant figures not exceeding the specified limits.

Example—

Policy	A	£500	Limit of value any
,,	B	£1,000	one article £50

Loss £45 on one article

$$\begin{array}{lll} & & £ \\ \text{A would pay } \frac{500}{1,500} \times £45 & = & 15 \\ \text{B} \quad ,, \quad ,, \quad \frac{1,000}{1,500} \times £45 & = & 30 \\ \hline & & 45 \text{ (i.e. less than the limit)} \end{array}$$

Example—

Policy	A	£500	Limit of value any
,,	B	£1,000	one article £50

Loss £75 on one article

As the loss exceeds the limit, only £50 can be recovered in all, so A pays $\frac{1}{3}$ = £16 13s. 4d. and B pays $\frac{2}{3}$ = £33 6s. 8d.

Example—

Policy	A	£500 —	Limit of value any one article	£25
,,	B	£1,000 —	,, ,, ,, ,,	£50

Loss £60 on one article

There are two different limits here and each must be respected. On the basis of the higher limit of £50 (i.e. the maximum amount recoverable) A is liable for $\frac{1}{3}$ of £50 = £16 13s. 4d. and B is liable for $\frac{2}{3}$ of £50 = £33 6s. 8d. Both figures are less than the respective limits, so A would pay £16 13s. 4d. and B £33 6s. 8d.

Example—

Policy	A	£500 —	Limit of value any one article	£25
,,	B	£1,000 —	No limit	

Loss £90 on one article

A is initially liable for $\frac{1}{3}$ of £90 = £30, but is in fact liable only for the limit of £25.

B ,, ,, ,, ,, $\frac{2}{3}$,, ,, = £60

As A's loss is limited to £25, the excess of £5 must therefore be added to B, whose policy contains no limit. Thus A pays £25 and B pays £60 + £5 = £65.

An alternative method is to work on the limits themselves, but the result is often unfair to one or more of the policies concerned.

Example—

Policy A £500 — Limit of value any one article £25
„ B £1,000 — No limit
Loss £90 on one article
Policy A's liability — £25 (its limit)
„ B's „ — £90
A pays $\frac{25}{115}$ × £90 = £19 11s. 4d.
B „ $\frac{90}{115}$ × £90 = £70 8s. 8d.

The result is inequitable, B paying over three times as much as A, although having only double A's sum insured.

If the policies concerned are subject to average, the liability is first of all found in the usual way and the limits then applied.

Example—

Policy A £500 — subject to average — limit any one article £25
„ B £1,000 „ „ „ no limit
Loss £90 on one article. Value at risk £2,000

		£	s.	
Policy A's liability is	$\frac{500}{2000}$ × £90 =	22	10	(within limit)
„ B's „ „	$\frac{1000}{2000}$ × £90 =	45	–	
		67	10	

Insured loses £22 10s.

RENT INSURANCES

The increasing use of (*a*) comprehensive policies for private houses and their contents and (*b*) consequential loss policies for trade risks has resulted in a reduction of specific policies or items of policies covering rent. Contribution, therefore, between specific rent items is comparatively rare, but it is more common where comprehensive and consequential policies are concerned. Although householders' policies are dealt with in Chapter 12, it is necessary to consider here that part which refers to cover in respect of loss of rent in order to explain the way in which contribution arises and how it is resolved.

Rent then can be insured in three different ways, viz.—

(*a*) Specific items

A typical wording is as follows—

On 12 months' rent subject to the attached Rent Clause £600

Rent Clause

The insurance on rent applies only if the building, or any part thereof, is unfit for occupation in consequence of its destruction or damage, and then the amount payable shall not exceed such proportion of the sum insured on rent as the period necessary for reinstatement bears to the term of rent insured.

This clause has the effect of dividing the sum insured into equal amounts for equal periods. In the example given, if the premises are

rendered unfit for occupation for a period of one month, the amount payable is one-twelfth (i.e. such proportion of the sum insured as the period necessary for reinstatement bears to the term of rent insured) of £600 = £50. The only reservation to make is that a rent policy is one of indemnity. If, therefore, there is over-insurance, only the rent in fact payable or lost for the period involved can be considered.

The effect of dividing the sum insured in this way also means that if there is under-insurance, only a *pro rata* proportion of the sum insured can be recovered by the insured in the event of loss involving a period less than that covered by the insurance. For example, if the rent is £600, but it is only insured for £300, a six months' loss will result in a payment by the insured of £150, i.e. six months at £25 a month.

The position can be summarized as follows—

(i) There are limitations both in amount and period.

(ii) The sum insured is regarded as divisible into equal amounts for equal periods.

(iii) The amount recoverable is—

$$\frac{\text{Period necessary for reinstatement}}{\text{Total period insured}} \times \begin{array}{l}\text{Sum insured } \textit{or} \text{ actual rent,}\\ \text{whichever is the less, for the}\\ \text{period insured}\end{array}$$

(*b*) **Householders' Policies** (Private dwellings only)

Rent under householders' policies is insured not as specific item, but as an extension of the sum insured. The wordings normally used are as follows—

(i) *Buildings*

Loss of rent in respect of the private dwelling house if so damaged by any of the said perils as to be rendered uninhabitable but only in respect of the period necessary for reinstatement for an amount not exceeding 10 per cent of the full value of the property as declared.

(ii) *Contents*

Loss of rent in respect of the private dwelling house (and reasonable additional expense necessarily incurred by him at an Hotel, Lodging House or Boarding House) in consequence of the said private dwelling house being so damaged by any of the said perils as to be rendered uninhabitable but only in respect of the period necessary for reinstatement and not exceeding in the aggregate 10 per cent of the full value of the contents as declared.

Although there is a limit to the *total amount payable*, namely, 10 per cent of the sum insured (for this purpose the words in brackets under the contents item are ignored), there is no reference to a maximum *period* of insurance and consequently there can be no reference to proportionate parts of such period. In other words the extension is akin to first loss cover; the only limitations being those of the period necessary for reinstatement, the maximum amount recoverable and the

maintenance of indemnity. On the assumption of the total destruction of a house insured for £3,500 let at a rental of £240 a year, the maximum amount payable under the extension is £350. If it takes eighteen months for reinstatement, then this sum is payable.

(c) Consequential Loss Policies

Rent, if insured, is included as a standing charge, i.e. a charge that continues to be payable although the turnover of a business may be substantially reduced as the result of damage by an insured peril. There is, however, one sum insured only covering, as a rule, net profit and all insured standing charges, so that it is not possible to allocate any particular amount to rent. The period applicable to the rent cover corresponds to the indemnity period, i.e. so many months, but whereas in the other two forms of rent described the liability of the insurer ceases when reinstatement has been effected, under the consequential loss policy liability continues until the business is restored to its normal or "pre-fire" level, provided the indemnity period is not exceeded. The distinction is important, not so much where contribution (which rarely arises) is concerned, but as a matter of cover.

Contribution between Rent Items

The three ways in which rent is insured have been described, and contribution between the various forms is now considered.

1. Specific Policies

Specific items on rent can be divided into equal amounts for equal periods; hence contribution presents no difficulties. This is because the various sums insured concerned and the actual rent can be reduced to a common factor, i.e. rent insured per month (or other period) per policy. Thus the policies become, in effect, concurrent non-average insurances. The following example makes this clear—

Example[1]—

A firm insures rent of its premises with three offices as follows—

Office A	—	Rent for one year	£600
Office B	—	" " first six months	£500
Office C	—	" " second six months	£500

The actual rent payable annually is £1,560.

Following a serious fire the premises are rendered unusable for nine months. Apportion the loss.

On the assumption that each policy is subject to the usual rent clause referred to earlier, the loss would be resolved as follows—

[1]C.I.I. examinations, 1955.

(*a*) Monthly rent insured by Policy A is $\frac{£600}{12}$ = £50

,, ,, ,, ,, B ,, $\frac{£500}{6}$ = £83 6s. 8d.

,, ,, ,, ,, C ,, $\frac{£500}{6}$ = £83 6s. 8d.

but Policy B covers rent for the first six months only, and Policy C covers rent for second six months only. The loss, therefore, must be split into two parts, i.e. first six months and subsequent three months.

(*b*) The actual monthly rent is $\frac{£1,560}{12}$ = £130

so the actual rent for each six months period is £780.

(*c*) *First six months—*

Actual rent lost is £130 × 6 = £780
Liability of A is £50 × 6 = £300
,, ,, B ,, £83 6s. 8d. × 6 = £500

As the total liabilities of A and B are more than the actual loss, the amounts payable by each will be *pro rata* to the liabilities. Thus A pays $\frac{300}{800}$ × £780 = £293 and B pays $\frac{500}{800}$ × £780 = £487.

(*d*) *Subsequent three months—*

Actual rent lost is £130 × 3 = £390
Liability of A is £50 × 3 = £150
,, ,, C ,, £83 6s. 8d. × 3 = £250

As before, the liabilities exceed the loss, so A pays $\frac{150}{400}$ × £390 = £146 and C pays $\frac{250}{400}$ × £390 = £244.

Summary

			£
A pays —	first six months	£293	
	second three months	£146	439
B pays —	first six months		487
C pays —	second three months		244
	Total rent lost ..		1,170

2. Householders' Policies

As the buildings and contents of private dwelling houses owned and occupied by the same person are often covered by different insurers, contribution arises frequently, but there is no agreed method adopted by all insurers for settling such losses among themselves. Difficulty arises because there is usually no rent, as such, where owner-occupiers are concerned, and some arbitrary figure must be adopted, e.g. the rateable value fixed for the purpose of Schedule A income tax.

Although an owner-occupier pays no rent because he owns his house, he does, in theory, pay "rent" to himself for the enjoyment of his house. If he is forced to go elsewhere as the result of his house being rendered uninhabitable by an insured peril, his expenses will include a measure of rent for whatever premises he and his family have to occupy temporarily.

Then comes the complication that whereas both buildings and contents policies insure loss of rent, the contents policy also covers additional expenses, or, if the house is let furnished, the rent payable for the use of the furniture.

There are at least three methods of settling such losses, once the rental value of the house itself is established—

(*a*) The building insurer pays the agreed amount of such loss of rental, leaving the contents insurer to pay the balance of the loss, i.e. the additional expenses or loss of rental for furniture.

(*b*) The loss is settled by the independent liability method.

(*c*) The loss is settled by the mean method.

Example—

Office A insured buildings for £5,000
Office B insured contents for £1,800

Agreed amount of insured's loss in respect of alternative accommodation £120 (six months) of which part is regarded as "loss of rent." Annual rental value of buildings agreed at £96.

Method (*a*)—

Building office A pays £48 (i.e. six months' rent)
Contents office B pays £72 (balance)

Method (*b*): *Independent Liability*—

The maximum liability of office A (Buildings) is 10 per cent of £5,000 = £500
The maximum liability of office B (Contents) is 10 per cent of £1,800 = £180

As the loss totals £120, the independent liability of each office is £120, so each pays £60 (i.e. one-half of the loss).

Method (*c*): *Mean*—

"Rent" first	*Liabilities* A	B	*Loss*	*To Pay* A	B
	£	£	£	£	£
Rent	500	180	48	35	13
Expenses	—	167	72	—	72
Expenses first					
Expenses	—	180	72	—	72
Rent	500	108	48	39	9
			Totals	74	166
			Mean	37	83

	£
Office A pays	37
Office B pays	83
	120

The three methods give different results, but, even so, as already explained, there is no consistency in practice.

If a specific item on rent comes into contribution with a householders' rent extension, the loss is apportioned on an independent liability basis.

3. Consequential Loss Policies

If a specific item on rent comes into contribution with a consequential loss policy which includes rent as a standing charge, the loss is apportioned by using the independent liability method. Here again there are complications.

1. The consequential loss policy is subject to average, which may operate to reduce liability.

2. It is almost certain that two different losses will arise. The rent policy covers loss of rent, as insured, only for the period necessary to reinstate the damage, whereas the indemnity given by the consequential loss policy is measured by the effect on the business, e.g. reduction of turnover or loss of output.

3. The insured is entitled to payment of the larger loss.

As with householders' policies, there is no agreed method of contribution, and each loss is decided on its own merits. As an example—and on the assumption of adequacy of the sums insured under both policies—the actual loss of rent could be shared equally between the two policies, the consequential loss policy paying the balance. But it might be equitable, in certain circumstances, for the rent policy to pay the balance. Suffice it to say that, as a rule, contribution is a matter for compromise between the insurers involved.

EXCESS AND FRANCHISE APPORTIONMENTS

(*a*) Excess of Loss Policies

The importation of average following a loss on property insured by two policies, one of which is free from average and the other effected to cover *an excess of loss only*, was considered on p. 135, and simple examples given. Although the possibility of contribution between such policies is today remote, further examples are given to show other aspects.

In any apportionments such as these, the *independent liability method* is used, and the following example illustrates an apportionment involving a policy with a smaller excess—

Sum insured by policy	A	£1,000	
,, ,, ,, ,,	B	1,000	subject to an excess of £200
Loss		£500	
Value		£2,000	

A imports average and its liability is $\frac{1,000}{2,000} \times £500 = £250$

B's liability is the loss *less* the excess, i.e. $£500 - £200 = £300$

			£
Therefore policy A pays	$\frac{250}{550} \times £500$	=	227
„ B „	$\frac{300}{550} \times £500$	=	273
			500

If the insurance *not* subject to an excess is written on a policy form which does not import average when brought into contribution with one that is, the independent liability method, in all probability, will again be used.

Thus, the previous example would be apportioned as follows—

A's liability is £500 (the amount of loss)
B's „ „ £300 (the loss *less* the excess)

			£
Therefore A pays	$\frac{5}{8} \times £500$	=	312
B „	$\frac{3}{8} \times £500$	=	188
			500

It has also been suggested that the "mean" method might be used, but it is doubtful if this method would be adopted in practice, since it entails an *arbitrary division of the insurances*, i.e. (*a*) the excess, and (*b*) the balance. With the use of the previous figures, the tabulation would be shown as follows—

	Insurances		*Loss*	*To Pay*	
	A	B		A	B
Larger loss first—	£	£	£	£	£
Balance ..	1,000	1,000	300	150	150
Excess ..	850	—	200	200	—
Smaller loss first—					
Excess ..	1,000	—	200	200	—
Balance ..	800	1,000	300	133	167
			Total	£683	£317
			Mean	£342	£158

	£
Therefore A pays	342
„ B „	158
	500

(*b*) Where the Excess or Franchise is Inserted Solely to Give Relief from Small Claims

It is occasionally necessary to deal with apportionments involving two (rarely, if ever, more) policies, both or one only of which may

contain a comparatively small excess or franchise. If both policies are so written, the excess or franchise is normally the same, and an apportionment is made in the usual way, after making the necessary deduction for the excess.

Example—

Policy	A	£500	Excess £10 each and every loss
„	B	£1,000	„ £10 „ „ „ „
	Loss £40		

As there is only one loss of £40, it would be unfair for each insurer to deduct £10 from its payment; hence one deduction only of £10 would be made, leaving £30, of which A would pay £10 and B £20. If the excess had been worded "Excess £10 each and every *claim*," it could be argued that each insurer intended to deduct £10 from any payment made, so the loss would be apportioned on the gross amount of £40, A paying $\frac{5}{15}$ = £13 6s. 8d. *less* £10 = £3 6s. 8d., and B $\frac{10}{15}$ = £26 13s. 4d. *less* £10 = £16 13s. 4d. This likewise would seem unfair to the insured unless the position had been made clear to, and accepted by, him.

If the policies are both subject to a franchise "each and every loss," any payment depends on the amount of the franchise. If the loss exceeds the franchise, the loss is payable in full, and would be apportioned accordingly. If the loss is less than the franchise, nothing would be payable.

If only one policy is subject to an excess, the excess is deducted from the agreed loss, the balance apportioned in the usual way, and the excess then added to the amount payable by the insurer whose policy is free from the excess.

Example—

Policy A £500 — Excess of £5
Policy B £1,000 — no excess
Loss £50

The excess is first deducted from the loss, leaving a balance of £45, of which A pays $\frac{5}{15}$ = £15, and B $\frac{10}{15}$ = £30. The £5 is then added to B's amount of £30, so that A pays £15 and B £35.

As an alternative, the mean method *could* be used, but it is cumbersome and is not adopted in practice. With a small excess the difference in the result would be insignificant.

If A were subject to a franchise of £5 instead of an excess the loss would be payable in full, the apportionment being made on sums insured. If the franchise in A had been £25 and the loss £20, the position is completely different. A is not liable at all (the loss is less than the franchise) and it appears that B would have to meet the whole loss. This seems unfair, and B *could* invoke the third part of the contribution and average condition, i.e. the importation of average when contributing

with a policy prevented (by the franchise) from *ranking concurrently*. Such a case would, indeed, be rare, and some compromise would doubtless be effected.

In practice, apportionments between two policies, one subject to a small excess and the other being free from any excess, usually arise with householders' policies. For example, owing to a mortgage interest A is obliged to effect a comprehensive policy (containing the usual excesses) with office Y for a specified sum. A does not think the sum sufficient, so he effects further cover himself with office X and for the second policy pays extra premium to have one or more excesses deleted.

In the event of loss caused, say, by the bursting of a pipe, there is contribution, but one policy is subject to an excess, whereas the other is not.

SALVAGE

Total destruction of part or the whole of the subject-matter by an insured peril is comparatively rare. Consequently there is often a certain residual value (particularly with stock-in-trade) which must be taken into account when adjusting a claim for partial damage. This residual value, representing property which is still of some worth, is termed salvage. In fact, anything *salved* or saved is commonly termed salvage.

Generally, it is preferable that the insured should retain the salvage, for the following reasons—

1. It may be possible for the property to be reprocessed or renovated in the insured's own factory, where he should have the labour and equipment best able to handle it.
2. If he cannot satisfactorily deal with or use it himself, he may know the persons or firms most likely to be interested in taking it over or dealing with it on his behalf.
3. Although he may consider it of little value, he may decide that it is dangerous or unwise for trade reasons to let the salvage come into the open market. In such circumstances the insured really "buys" the salvage at an agreed figure.

Where the insured retains the salvage, the loss is paid net, i.e. gross agreed amount of damage less the value of the salvage.

Sometimes, particularly in large claims, the insurers, usually on the advice of their adjusters, decide that they can dispose of the salvage more advantageously by taking it over themselves.

The salvage is then often put out to tender, and firms interested in salvage generally, or in the particular commodity or commodities concerned, send in their tenders. The salvage, as a rule, goes to the highest bidder. The receipts for the sale then help to reduce the gross loss paid to the insured.

Where, therefore, the insurer takes over the salvage, the loss is paid gross, any receipts from the sale of the salvage accruing for the benefit of the insurers.

Owing to a sudden change in the market or the retention of salvage for a long period during which there is inflation, it has been known for salvage to realize more than the gross loss paid to the insured. Provided the insured has received an indemnity, based on the value of the property at the place and time of the loss, strictly he is entitled to no further payment, and all receipts for the salvage are therefore due to the insurers. In practice, however, much would depend on the circumstances of the case and it is doubtful if insurers would retain out of the receipts more than enough to cover their total outlay (i.e. amount of claim and expenses incurred in dealing with the salvage).

An insured sometimes expresses a particular wish not to handle the salvage in any way, but, as was seen in Chapter 5, when the standard policy conditions were studied, he is not entitled to *demand* that the insurers shall take over the salvage or, as stated in the relative policy condition, he cannot abandon the salvage to the insurers. If he were allowed so to do, he could claim payment for a gross loss, leaving the insurers to dispose of the salvage as best they could. If this occurs, i.e. an insured wishes to have nothing whatever to do with the salvage, the position must be dealt with solely on its merits. Insurers are not unreasonable, but the principle of non-abandonment must be clearly kept in mind.

Salvage is occasionally sold "for account of whom it may concern." Such a step is taken—

1. When the salvage cannot be identified with any particular insured property.
2. Where ownership may be in dispute.
3. Where the question of policy liability is in doubt.
4. When the insured is likely to have an interest in the salvage proceeds (wholly or in part) because of—
   (*a*) under-insurance; or
   (*b*) the operation of a condition of average.

The adjuster or any other party disposing of salvage in this way would be acting as agents for the owners and would therefore make arrangements for it to be insured, perhaps by giving instructions themselves. Alternatively, they might arrange for the person or firm handling the salvage, e.g. salvage merchants, to effect insurance.

Apportionments Involving Salvage

If the loss is settled on a net basis, any apportionment automatically takes salvage into account. If the loss is settled on a gross basis, the

salvage belongs to the insurers, and any credit therefrom is divided between them in proportion to the amounts paid. If, however, any or all of the sums insured are subject to average and there is under-insurance, the insured becomes "his own insurer" for a proportion of the loss and is therefore entitled to a similar proportion of the salvage.

Examples—

(*a*) *Non-Average*

Insurances A	*Insurances* B	*Loss*	*To Pay* A	*To Pay* B
£500	£1,000	£600	£200	£400

Salvage £150 A receives $\frac{200}{600} \times £150 = £50$

B ,, $\frac{400}{600} \times £150 = £100$

(The apportionment could equally well be based on sums insured)

(*b*) *Average*

Insurances A	*Insurances* B	*Loss*	*Value*	*To Pay* A	*To Pay* B	*Insured Losses*
£500(A)	£1,000(*A*)	£600	£2,000	£150	£300	£150

			£	s.
Salvage £150	A receives	$\frac{150}{600} \times £150 =$	37	10
	B ,,	$\frac{300}{600} \times £150 =$	75	-
	Insured ,,	$\frac{150}{600} \times £150 =$	37	10
			150	-

A serious fire involving the property of many interests may result in salvage which cannot be identified as belonging to any particular interest. Such salvage is sold to the best advantage and the receipts, *less* expenses, divided among the insurers concerned in proportion to the losses paid.

SALVAGE CORPS

The tariff offices established and maintain the three Salvage Corps located at Glasgow, Liverpool and London. These Corps were formed in the nineteenth century to carry on the work previously undertaken by the companies' own fire brigades. Their duties were and still are primarily to safeguard the interests of insurers, by taking such measures as will minimize the loss at any premises they attend. Some of the more important services rendered are as follows—

1. The covering of damaged buildings with tarpaulins or roofing felt.

2. The moving and covering of contents with salvage sheets or tarpaulins.

3. Removal of water and smoke by various means and prevention of spread of water by damming.

4. The drying, cleaning, and polishing of machinery.

5. Prevention of deterioration of stock.

6. The watching of premises as a precaution against further outbreak of fire and the possibility of theft.

7. The handling of the salvage and debris.

The tariff offices make periodic contributions (called rate-in-aid) towards the maintenance of the Corps, and, in addition, pay the charges which are levied each time the Corps turn out to visit the scene of a fire. These charges are based on—

(i) a turn-out charge;[1]

(ii) additional charges which vary according to the services rendered, e.g. time spent at a fire and time spent thereafter for watching or working salvage.

In Liverpool only, additional charges are imposed for the salvaging of cotton, and in Glasgow and Liverpool normal charges are increased for attendance at fires outside the city boundaries. In addition, all these charges are loaded by a percentage if services are rendered to non-member insurers, who otherwise make no contributions to the Corps.

Apportionment of Charges

Although there are some differences in the way the three Corps apportion their charges between insurers, the methods adopted are basically similar.

1. *Turn-out Charge*—

(*a*) *London*—a charge is made to each insurer interested on the risk to which the Corps is called.

(*b*) *Liverpool*—a minimum charge is made, which is equally divided between the insurers concerned. If more than five insurers are involved, a set charge is levied on each insurer.

If, however, the risk is scheduled, the total turn-out charge, calculated at the set rate per insurer, is apportioned among the insurers according to their respective percentages.

(*c*) *Glasgow*—apportioned between insurers *pro rata* to the sums insured at risk.

2. *Charges for Other Services*—

These charges are based on so much an hour and are made for general salvage work, as previously indicated. Such charges are apportioned among the interested insurers *pro rata* to the sums insured at risk, and

[1]London Salvage Corps do not impose a turn-out charge when little or no salvage work is carried out.

for the purposes of these apportionments the following rules have been fixed.

(*a*) *Buildings and rent* (if at risk)—one-fourth of the sum(s) insured. (These policies are not called into contribution in apportioning charges made by the Glasgow Salvage Corps.)

(*b*) *Consequential loss*—20 per cent of the total sum insured on contents ranking for contribution effected by the insured (in whose name the consequential loss policy stands) or the sum insured under the consequential loss policy, *whichever is the less.*

(*c*) *Floating policies*—the amount actually at risk at the time of the fire.

(*d*) *Specific declaration policies*—the last declaration before the fire.

(Contents policies, other than above, rank for contribution on sums insured at risk.)

EXTINGUISHING EXPENSES

With the passing of the Fire Brigades Act, 1938, property owners were no longer charged for the attendance of a fire brigade. Hitherto the majority of fire authorities had been entitled to require owners or occupiers of property in which a fire occurred to make payment for the services rendered by the fire brigade, and it was the custom for these charges to be passed on to and met by the relative insurers, usually on an *ex gratia* basis. The insurers obviously benefited by the Act and in return paid £600,000, partly to compensate the local authorities and partly towards the establishment of a Research and Training Trust to encourage the study of fire protection and prevention. The provision of fire extinguishing appliances and personnel is now legislated for under the Fire Services Act, 1947, whereby Local authorities are made responsible for fire protection free of charge to property owners, and from the insurers' point of view, therefore, the change brought about by the 1938 Act is continued. There are three exceptions to the provisions of the Act.

London. All insurers are still obliged to contribute to the maintenance of the London Fire Brigade. This obligation was first imposed by the Metropolitan Fire Brigade Act, 1865 (when the companies' brigade was finally handed over to the local authority), and involves an annual contribution of £35 for every £1,000,000 gross sum (i.e. without taking into account any reinsurance) insured on property in the area controlled by the London County Council.

Liverpool. Insurers pay an annual levy to the Liverpool Fire Police.

Salford. Charges are made for each attendance and the accounts passed to the relative insurers for payment.

Generally, therefore, insurers are not liable for any payments made

in connexion with fire extinguishment, but requests are sometimes made for consideration to be given to services rendered by—

(*a*) voluntary helpers, and
(*b*) works' brigades.

(*a*) VOLUNTARY HELPERS

Insurers are usually generous in making *ex gratia* payments to helpers, who often render valuable assistance in helping to extinguish fires, stop them from spreading, or assist in salvaging operations, sometimes damaging their clothes or other personal effects in the process.

(*b*) WORKS' BRIGADES

These brigades, if not otherwise engaged, often render assistance at nearby fires outside their works, but are not entitled to ask the insurers for any payment for their services if they proceed to the scene of the fire of their own free will. Nevertheless, insurers usually consider making an *ex gratia* payment for their services. If, however, the brigade turns out in response to a specific request, a contract has been entered into and the brigade concerned can then legally make a charge. The insurers, in such circumstances, normally reimburse the insured.

If several properties are at risk during the course of a fire and extinguishing or similar expenses coming under the above two headings are incurred, they must, if paid, be apportioned where the properties concerned are covered by different insurers. Sums insured on the property considered to be within risk of the fire are usually taken as a basis, subject to the following special considerations—

1. Farming stock
2. Floating policies } Value at risk taken as basis.

3. Declaration policies — *normally* the last declaration taken as basis.

4. Loss of profits policies — 20 per cent of all policies on contents or the sum insured under the loss of profits policy, whichever is the less, usually taken as basis.

5. If average applies and there is underinsurance, then, strictly, the insured must bear his own share of the expenses.

Ex gratia payments are often made for refilling fire extinguishers although there is no justification for so doing.

In a recent case a farmer paid an amount of £39 15s. to seventeen helpers from his own and neighbouring farms who, with the aid of four borrowed tractors and buck rakes, spent a considerable time in moving various machines, implements, and hay from a Dutch barn, one end of which was on fire. The insurances were shared by three offices and the amount was apportioned as shown overleaf—

Office A	Produce at risk at	£				
	commencement of fire	1,092				
	Unspecified implements	85		£	s.	d.
		1,177	paid	11	1	11
Office B	Nine specified machines	2,140	,,	20	3	5
Office C	Building of barn	900	,,	8	9	8
		4,217		39	15	–

CHAPTER 10

EXTENDED PERILS OF THE STANDARD POLICY

THE standard fire policy is basically one covering fire damage only, although such damage is excluded if caused by certain specified perils, e.g. fire caused by riot and civil commotion or earthquake. Since it is a fire policy, damage *other* than by fire, apart from lightning and "domestic" explosion, is automatically excluded. It is possible, however, by the payment of additional premiums to extend the standard policy—either by endorsement or by the issue of a separate policy—to cover some of these excepted perils and others as well (commonly known as extra or special perils), and the relative terms and conditions applicable thereto are now considered together with comments which may affect claims.

COMMON CONDITIONS AND EXCLUSIONS

Before separate consideration is given to each of the various extra perils certain common conditions and exclusions are studied.

1 (*a*) Maximum liability

It is stated that liability under the policy and the extension shall not exceed the sum insured under the policy. The aim here is that the policy and extension shall be treated as a single insurance. Thus losses by *any insured peril* (in the absence of reinstatement of cover) have the effect of reducing the sum insured by the amounts paid. This limitation can be effective only if the extension is given by an endorsement placed on the original policy, and cannot apply if a separate policy is taken out for the extra peril(s).

1 (*b*) Average

If the fire sum insured is subject to any condition(s) of average, then the sum insured for the extended peril or perils is similarly so subject. In the absence of any condition of average, comparison is to be made between the sum insured against fire and that against the extra peril(s). If a fire policy is extended to include extra perils, the figures are usually the same, but if the additional cover is given by a separate policy the condition comes into operation if the sum insured against the extra peril(s) is less than that against fire. The reason is to ensure, as far as possible, that the sum insured effected in respect of the extra perils shall not be less than the corresponding figure for fire.

2. War Risks

Apart from loss or damage by the operation of natural perils, such as earthquake or storm, all extra peril extensions incorporate a War Risks Exclusion Clause. This is necessary because the original policy excludes only fire caused by war risks; the exclusion must therefore be repeated for each peril covered.

3. Radioactive Contamination

For similar reasons, the majority of extra perils extensions incorporate a radioactive contamination exclusion clause.

4. Consequential Loss

Consequential loss of any kind or description is excluded.

AIRCRAFT

The wording "Destruction of or damage to the property insured (by fire or otherwise) directly caused by Aircraft and other Aerial Devices or articles dropped therefrom" is straightforward, and the extension incorporates no additional conditions. Although the standard policy does not exclude fire damage caused by aircraft, for simplicity this cover is repeated in the wording, which must therefore be suitably amended if the extension is given by means of a separate policy, so that it reads "destruction . . . otherwise than by fire directly caused . . .."

The inclusion of the words "other aerial devices" brings the wording up to date, in view of recent aeronautical developments.

Damage caused in this sphere of activity is usually the result of impact from crashing aircraft, although there are frequent reports of damage caused by objects falling from aeroplanes, chiefly lumps of ice. The only other type of damage coming under this extension is that due to the so-called "sonic or supersonic bangs," caused by the build-up of pressure waves when an aeroplane goes into a power dive. Although damage of this kind was never envisaged when the aircraft extension was originally introduced, insurers have been faced with, and have met, such claims, provided sufficient evidence has been forthcoming that the damage was so caused. In July, 1955, the Minister of Supply, in a statement made before Parliament, promised that, wherever possible these supersonic flights would in future be made only over the sea, so that further claims from this cause should diminish.

Subrogation

Insurers are often able to exercise subrogation rights if they meet claims by reason of damage or destruction by aircraft. The Civil Aviation Act, 1949, imposes liability unlimited in amount, irrespective of negligence, on aircraft operators in this country. Similar provisions do

not necessarily apply elsewhere, and although many countries impose corresponding regulations there is as yet no international agreement.

Nevertheless aircraft operators, as a rule, insure against liability to third parties, and, provided the insurance is adequate, the chances of recovery are usually good. If the damage is proved to have been caused by aircraft operated by any of the Services by a Government department, liability is usually admitted and compensation paid. The same position applies to damage caused by supersonic bangs, but it is not always possible for the identity of the offending aircraft to be determined.

EARTHQUAKE

The wording is simple and concise and merely refers to destruction or damage directly caused by earthquake. Thus any damage, whether by fire or otherwise, would be covered. There are no additional conditions.

EXPLOSION

The limited extent to which explosion is already covered under the standard policy was fully explained in Chapter 3, and in order to widen this cover the policy can be extended to include what is often called "full explosion." This is a misleading term, for the wording used to grant this extra cover contains some exclusions for which there are good reasons. The wording normally used reads as follows—

> Destruction or damage (by fire or otherwise) of or to the property insured directly caused by EXPLOSION.
>
> *Special Condition*
>
> The insurers shall not be liable for destruction or damage by Explosion (other than destruction or damage by fire resulting from Explosion) occasioned by the bursting of a Boiler (not being a Boiler used for domestic purposes only) Economizer or other vessel, machine, or apparatus in which internal pressure is due to steam only and belonging to or under the control of the Insured; nor for the damage or destruction of vessels, machinery, or apparatus or their contents resulting from the Explosion thereof.

The special condition applicable is designed to make it clear that the extension does not apply to loss or damage properly covered under a more specialized type of insurance, viz. engineering. Boilers and other apparatus under steam pressure need regular inspection, and special policies are available. Similar remarks apply to other apparatus under pressure. The position can be summarized as follows—

1. Liability for fire damage continues.
2. No liability attaches for *any* damage (other than fire) caused by the explosion of boilers and other apparatus under steam pressure *belonging to or under the control of the insured,* (but see (3)).

If, therefore, damage is caused to property insured (under a standard policy extended to include explosion) by the explosion of a steam boiler

belonging to somebody else, such damage is recoverable under the policy. The insurers have subrogation rights against the boiler owners or users.

3. Liability for explosion damage caused by domestic boilers continues.

4. There is no liability for loss or damage to apparatus and their contents which themselves explode, but the exclusion does not apply to damage done to surrounding property.

If the explosion extension is given by a separate policy, the wording is amended to exclude all damage covered by the original fire policy.

There are a few vessels under pressure which are not normally insured under engineering policies, and if the insurers are able to confirm that all the other pressure vessels belonging to an insured are properly covered, they will delete the words "nor for . . . explosion thereof" in the special condition, thus ensuring full cover over the fire policy, the explosion extension, and the engineering policy.

In certain circumstances it is possible for cover to be operative both under a fire policy extended to include explosion and an engineering policy. If it is decided that contribution applies, the independent liability method would be adopted although the engineering policy is generally regarded as primarily liable and no contribution sought.

IMPACT

The cover is usually defined as "Impact by any road vehicle, horses, or cattle, not belonging to or under the control or custody of the insured." Sometimes such words as ". . . the insured's employees or any director of the business" are added.

The damage commonly forthcoming under this heading is that due to impact by motor vehicles. The drivers of such vehicles are by law responsible for damage occasioned by their negligence and usually effect the insurance necessary to cover their liability. The Road Traffic Act, 1960, only makes it compulsory for insurance to be effected to cover liability for death or bodily injury; hence it is possible for an owner to suffer damage to his property and yet be unable to recover his loss from the offending party. Apart from the inability to prove negligence or the lack of insurance by the vehicle driver (generally accompanied in such circumstances by a complete lack of any private financial resources) the property owner may find it impossible to trace the vehicle, which may have been driven away from the scene of the accident before it could be identified.

In order to minimize the work and expense involved in one insurer taking action against another (i.e. by subrogation)—assuming the driver of the vehicle is known and insured—many insurers have entered into sharing agreements, whereby such claims are shared between the

fire and motor departments on a pre-arranged basis without reference to legal liability. These agreements concern the insurers only and the insured is not a party to them.

Upon notification of impact damage to insured property, the claims department take the usual steps to settle the loss, at the same time asking their insured to give them, if known, the name and address of the driver concerned in the incident and the registration number of his vehicle. The driver is then approached and is asked for the name and address of his insurer. If this is forthcoming the claims department write to that insurer holding him liable for the damage caused. If there is sufficient proof that the damage was caused by the vehicle described, the relative insurer is usually liable for the agreed amount of damage caused and either refunds in full (since the vehicle policy is primarily liable) or refunds a proportion if a sharing agreement is in force between the two insurers.

RIOT AND CIVIL COMMOTION

The wording used is as follows—

> Destruction or damage (by fire or otherwise, including explosion) of or to the property insured directly caused by
>
> RIOT, CIVIL COMMOTION, STRIKERS, LOCKED-OUT WORKERS or persons taking part in LABOUR DISTURBANCES or malicious persons acting on behalf of or in connexion with any POLITICAL ORGANIZATION.
>
> *Special Conditions*
>
> 1. This insurance does not cover—
>   (*a*) Loss or damage occasioned by or happening through confiscation or requisition by order of the Government or any Public Authority.
>   (*b*) Loss or damage resulting from cessation of work.
> 2. On the happening of any loss, destruction or damage, full details of such loss, destruction or damage shall be furnished to the Insurers within seven days.

Riot and civil commotion were considered on pp. 35 and 36, and the five essential requirements to constitute a riot are there listed.

When the extension is given by endorsement of a fire policy, some of the original cover is repeated. The fire policy does not exclude fire damage caused by strikers, locked-out workers, etc., but the wording would be clumsy if the extension were worded to apply only to the additional cover granted. Nevertheless, if the extension is given by means of a separate policy the necessary amendment to the wording must be made. The reference to the inclusion of explosion is essential to override one of the printed conditions of the policy, which states categorically that explosion is excluded, whether occasioned by fire or otherwise.

Exclusions

(*a*) LOSS BY CONFISCATION, ETC., BY ORDER OF THE GOVERNMENT

This is self-explanatory. Action by those in authority could well lead to losses which went beyond the cover envisaged by the insurers. Sufferers from such confiscation, etc., would normally receive compensation for their losses from the authorities concerned.

(*b*) LOSS FROM CESSATION OF WORK

This is also self-explanatory. Rioting, leading to the withdrawal of labour from key points, e.g. power stations, could lead to widespread losses. Strikers, too, might not only damage property, but in addition could intimidate other workers and force them to leave machinery unattended, with disastrous results.

Notification of Loss

The necessity to notify any loss within seven days stems from the provisions of the Riot Damages Act, 1886, which stipulates that claims for compensation must be made in writing to the appropriate authority within fourteen days of the happening (although this time limit may be extended to forty-two days if "special cause" be shown). The seven-day limit in the condition, therefore, gives the insurers the opportunity to make sure that the claim is submitted within the stipulated time.

The Act states that where certain property is damaged, destroyed, or stolen by any persons "riotously and tumultously assembled together," compensation is payable out of the police rate of the district to any person sustaining a loss. The property is defined as houses, shops, or buildings, including any appurtenances thereto or the property therein, and would not appear, therefore, to extend to moveable property in the open, apart from certain specified types of machinery.

Other pertinent provisions of the Act are—

1. In fixing the amount of compensation the conduct of the claimant is taken into account. Such conduct includes—
   (*a*) the precautions taken;
   (*b*) whether he was a party to the rioting;
   (*c*) whether he provoked the rioters.

2. Any compensation is reduced by amounts recovered by way of insurance or otherwise.

3. Insurers have subrogation rights, once they have paid their insured. They can take action against the authority concerned in their own name. When they have recovered any amounts paid the sum insured is held to be reinstated to that extent.

4. The Act allows no costs to any claimant.

5. Goods in trust are covered.

6. Claims must be made on regulation forms (obtainable from H.M. Stationery Office).

The Riot Act

Many students seem to think that the expression "reading the Riot Act" has something to do with the Riot (Damages) Act, but this is wrong. The Riot Act, 1714, creates certain statutory offences for riot attended by circumstances of aggravation. The Act makes it the duty of a justice, sheriff, mayor, or other authority, whenever twelve persons or more are unlawfully, riotously and tumultously assembled together, to the disturbance of the public peace, to resort to the place of such assembly and *to read a proclamation*, charging all those assembled to disperse immediately and peaceably "upon the pains contained in the Act . . . for preventing tumultuous and riotous assemblies. *God save the Queen.*"

The Riot (Damages) Act does not apply to Scotland, Northern Ireland, and Eire, and the law applicable to those countries is briefly as follows—

Scotland. Several Acts, including the Malicious Damage Acts, 1812 and 1816, the Seditious Meetings Act, 1817, and the Riotous Assemblies (Scotland) Act, 1822, govern the position and the broad effect is similar to that of the English Act, the main differences being that in Scotland

1. Any action for any claim of damage must be commenced within one calendar month of the happening and

2. There is no provision for an insurer to take action against the authorities in his own name. The authorities would have to meet their statutory liability, leaving the insurer to exercise his subrogation rights in the usual way.

Northern Ireland. The recently introduced Criminal Injuries Acts (Northern Ireland), 1956 and 1957, have brought the position here closely into line with the English and Scottish Acts, although there are differences, viz.—

1. There is no specific provision for the exercise of subrogation rights by insurers (although these rights exist at common law).

2. Provision for compensation falls into three categories—

(*a*) *Malicious damage to property.*

Up to £20 can be recovered in respect of certain agricultural property, e.g. buildings, livestock, implements and produce.

(*b*) *Malicious damage to property caused by at least three persons "riotously or tumultuously assembled."*

Claims involving damage amounting to more than £20 come under this heading. The damage is in respect of "moveable or immoveable property whatsoever."

(*c*) *Damage caused by any malicious person acting on behalf of or in connexion with any unlawful association.*

No limit of amount is imposed, but the damage must be caused "unlawfully, wantonly or maliciously" to any moveable or immoveable property.

Eire. Several Acts, e.g. Grand Jury (Ireland) Act, 1836, Criminal Injuries (Ireland) Acts, 1919 and 1920, have been passed and these allow anyone suffering malicious injury to his property to claim compensation from the local authority in whose area the damage was caused. Claims under these Acts are brought in the circuit court, and the evidence must eliminate the possibility of non-malicious damage. Proceedings can only be brought by the persons whose property has been damaged. Information on oath must be given before a justice of the peace within three days of the occurrence, and a claim in writing lodged within seven days.

So far as Northern Ireland and Eire are concerned, malicious damage itself can in certain circumstances give rise to compensation. If, therefore, fire damage is proved to have been caused maliciously, the insurer involved will be able to exercise subrogation rights. It follows that it is important to ensure that the insured has taken the necessary steps to notify and lodge the claim within the prescribed time.

MALICIOUS DAMAGE

The normal riot extension includes damage or destruction caused by malicious persons but only if they are acting on behalf of or in connexion with any political organization. This limitation can be removed so that all damage, however caused by malicious persons, can be covered. The change is effected by deleting the words "acting on behalf .... political organization" in the riot wording. The removal of the limitation is accompanied by two additional exclusions, viz.—

1. Destruction or damage by burglary, housebreaking, larceny, or theft (more properly covered by a burglary policy);
2. The first £10 of each and every loss (to prevent the submission of claims for minor damage).

This extension also incorporates a special condition (which is stated to be a condition precedent to any claim) that immediate notice of any damage or destruction shall be given to the police authority. This is to ensure speedy action by the police and so improve the chances of tracing the person or persons concerned, perhaps with the ultimate recovery of payment made for part or the whole of the damage caused.

These two additional exclusions and the special condition do not apply if the damage caused is by fire or explosion.

SPONTANEOUS COMBUSTION

It is unusual to find policies extended to include "destruction or damage by fire only of or to the property insured caused by *its* own

spontaneous fermentation, heating or combustion" because insurers generally are not anxious to extend the cover in this way. If the extension is nevertheless granted, no additional conditions are imposed, unless by special arrangement, e.g. periodic testing of temperature.

STORM, TEMPEST, FLOOD, AND BURST PIPES

Storm, Tempest, and Flood

Although there is no standard wording, insurers as a rule use wordings which are basically similar in the cover given and in the limitations and conditions applied. One of the main drawbacks with the extension is the lack of any legal definition of the words "storm and tempest," so that there is wide scope for the submission of claims coming under this heading. Flood is capable of definition up to a point and is usually described as the escape of a body of water from its natural confines, e.g. overflowing of a river, bursting of a dam. It is usual to exclude flood damage[1] if only storm and tempest are covered; otherwise such damage, if proximately caused by storm, would be included. In any event the cover nearly always excludes damage caused—

(*a*) by subsidence or landslip;

(*b*) to fences and gates;

(*c*) to moveable property in the open. (This exclusion may be waived so far as flood is concerned.)

In addition, an excess, e.g. £5 or more, is nearly always imposed to prevent the submission of claims for minor incidents.

Burst Pipes

The wordings used by insurers likewise vary considerably, but basically they refer to destruction or damage caused by the bursting or overflowing of water tanks, pipes, or apparatus. Destruction or damage while the premises are unoccupied is normally excluded (for the reason that the premises may be unheated during frosty weather and the cause may continue operating for a long time before it comes to notice), as well as that caused by water discharged or leaking from an installation of automatic sprinklers. An excess is usually imposed.

Most wordings under this heading usually embody the following particular conditions—

1. The cover excludes damage which would be recoverable under

(*a*) a fire, explosion, or earthquake policy;

(*b*) a glass policy. (This is sometimes limited to the glass in the shop front.)

Such damage, as indicated above, is more properly covered under other policies.

[1]If flood damage is excluded, the tendency is to incorporate the wording adopted for the householders' policy on buildings (see p. 221).

2. A warranty that the premises shall be maintained in a good and substantial state of repair.

The efficacy of this warranty is doubtful as such (it might not be easy to decide if premises had in fact been properly maintained), but it does at least strengthen the insurers' position when dealing with unreasonable claims, e.g. those where an insured is unwilling to agree to a considerable contribution towards the repair of neglected property.

Subrogation

Claims fall broadly into two classes, namely—

(*a*) where the damage occurs in one building;

(*b*) where water escapes from one building to another.

(*a*) *Where the Damage Occurs in One Building*

A landlord can be liable for damage to the property of his tenants caused by defects in any part of the structure retained in his occupation and control where he is aware of or should have known of such defects (by notice or reasonable inspection), unless such defects were inherent at the time of letting. Claims of this type often arise from defective roofs, blocked guttering, and the like.

If water escapes from the normal water supply, installed for the benefit of the occupiers, liability will attach only on proof of negligence, the onus of proof being on the plaintiff. Liability could attach to any of the tenants in addition to the landlord or his servants.

(*b*) *Where Water Escapes from One Building to Another*

The principle of *Rylands* v. *Fletcher* normally applies unless the water is used for ordinary domestic purposes as distinguished from handling in bulk (*Collingwood* v. *Home & Colonial Stores*, [1936] 3 All E.R. 200). In the case of domestic supplies negligence must be proved.

In a recent loss involving a claim for damage by flood to property also covered by a marine policy, it was agreed that the marine policy was primarily liable, and a full recovery was obtained by the insurer who had indemnified the insured under his fire policy, which had been extended to include destruction or damage by flood.

CHAPTER 11

EXTENSIONS AND LIMITATIONS TO THE STANDARD POLICY

DURING and since World War I the need for simplification and economy, coupled with often intense competition, has led to the introduction of many extensions to, and variations of, the cover afforded by the standard policy. These extensions and variations are now considered, together with a few limitations which are much older, from the standpoint of claims.

ARCHITECTS' AND SURVEYORS' FEES

Although there is a school of thought which argues that any sum insured on buildings automatically includes a measure of architects' fees since, generally, no building can be erected without the services of an architect at some stage or another, it is also argued that such fees must be regarded as something apart from normal building costs, i.e. materials plus labour and profit, and should therefore be insured specifically. Whichever argument is held to be correct, there is no doubt whatever that it is preferable to make special mention of these fees for the following reasons—

1. Attention is drawn to the need for an adequate sum insured.
2. The terms under which such fees are payable are clearly set out.

The wording used by insurers is not standardized, but is basically similar, the cover being given either by a separate item or by extending the item covering the building. A typical clause reads as follows—

> The insurance on Fees applies only to those necessarily incurred in the reinstatement of the property specified consequent upon its destruction or damage but not for preparing any claim, it being understood that the amount payable for such fees shall not exceed those authorized under the scale of professional charges of the Royal Institute of British Architects and/or of the Schedule of professional charges of the Royal Institution of Chartered Surveyors.

The words are clear but notice particularly—

(*a*) the fees must be *necessarily* incurred;

(*b*) they are only payable provided the property is in fact reinstated;

(*c*) no allowance is made towards the cost of preparing the claim;

(*d*) limitation on the amount payable is effected by referring to the scale of charges laid down by certain professional bodies.

If the cover is given by extending the sum insured on the building, the wording makes it clear that liability for damage plus fees shall not exceed in the aggregate such sum insured.

COLD STORAGE CLAUSE

This embodies a limitation and relieves the insurer from liability to pay for damage to certain quickly perishable foodstuffs caused by change of temperature resulting from the total or partial destruction or disablement of the refrigerating plant by fire.

In the absence of this clause, it could be argued that damage or destruction so arising was proximately due to fire. The exclusion can be waived by the payment of additional premium.

CONSULTING ENGINEERS' FEES

Apart from the fact that these fees relate to the reinstatement of plant and machinery, the wording given and remarks made in relation to architects' and surveyors' fees apply equally here. The scale of fees referred to is that of the Association of Consulting Engineers.

DECLARATION POLICIES ON STOCK

The primary purpose of the declaration policy is to ensure maximum cover at the lowest possible cost, the monthly declarations being made solely for the purpose of premium adjustment. From the claims' standpoint therefore, consideration need only be given to the following—

1. Each sum insured is subject to the *pro rata* condition of average.
2. The *sum insured* itself is always the limit of indemnity.
3. Declaration representing values in fact at risk at particular dates and given only for purposes of premium calculation at the end of the insurance year will, in the event of loss, be referred to only in order to make comparison with the sum insured to see if average is likely to apply. If average does apply, the sum insured is compared with the value at risk on the day of the fire.
4. All other insurances on the same property must be identical. This provision is inserted as a warranty.
5. All losses must be automatically reinstated so that successive losses do not reduce the sum insured.

DEBRIS REMOVAL

The clearance or removal of certain debris to permit reinstatement either of buildings or plant and machinery has always been regarded as a legitimate item of expenditure recoverable under a fire policy, subject to the limit of the sum insured. Occasions often arise, however, where property is erected on another site or where the collapse of part or the whole of a building and its contents results in the debris falling in a place or places where its presence does not affect reinstatement at all. The following two examples are taken from cases.

1. A wall collapsed and fell into an adjoining street, impeding traffic.

The debris thus constituted a nuisance and had to be removed at considerable cost by order of the local authorities.

2. Part of a wall collapsed and fell into a shallow river. The debris formed a dam with the result that nearby properties were threatened with flooding. The debris had to be removed immediately.

Examples of the clearance of debris with stock claims are common and have included *inter alia* the removal of debris from fires involving such commodities as waste paper, woodflour, cement, nuts, and cork. In a recent report an adjuster said: "The value of these goods was met under the appropriate item, but their remains became a liability to your insured."

In none of the circumstances cited above would any compensation have been forthcoming in the absence of the extension to cover debris removal. The object of the extension is to indemnify an insured for the cost of removal of debris, which can often be additional to the indemnity given under the terms of the ordinary standard policy.

In addition to the removal of debris, costs and expenses can be incurred for dismantling or demolishing, shoring up or propping property or portions thereof, damaged or destroyed by an insured peril. Any such costs must be necessarily incurred and the consent of the insurer obtained.

The cover is given by extending the sum insured for building and contents *excluding stock*, or by the provision of a separate item (*not* subject to average) to cover building and contents *including stock*, in one amount or separate amounts if so desired. The cost of removal of *stock* debris must be insured specifically, either by itself or with other property, for a variety of reasons, two of which are—

1. Many stock items are on a floating basis and it would be impossible to calculate a value for the purposes of applying average. Similar considerations apply to declaration policies.

2. As mentioned earlier, the basis of value for stock is its market value. Once this value is paid, therefore, the liability of the insurer is terminated and any additional cost, such as removal of the debris, must be separately insured.

In some circumstances it might pay the insurers to arrange for the debris to be removed for salvaging purposes, when they would bear the cost, provided the proceeds of the salvage were adequate to cover such cost. If the salvage did not realize enough to cover the cost involved in removing the debris, the insurers, in the absence of the clause, would not be liable for the balance.

ELECTRIC CLAUSE

This clause incorporates a limitation and is of old standing. It excludes liability for destruction or damage to electrical machinery or

apparatus by *its* own over-running, self-heating, excessive pressure, short circuiting and the like. Thus the clause is similar in operation to the exclusions of spontaneous combustion and heat processing set out in the standard policy preamble. The important word is "its", for if fire ensues any subsequent damage to other property is covered.

PURCHASE TAX

The comparatively recent introduction of purchase tax led some insurers to draw attention to the fact that compensation for certain articles destroyed or rendered irreparable could only include purchase tax if—

(*a*) the sum insured had been increased to include such tax;
(*b*) the property destroyed were replaced, or
(*c*) if not replaced, that the tax had been paid at the time of purchase.

These limitations are essential for in the absence of replacement it could be argued that an insured would receive more than indemnity if he received a payment which included provision for purchase tax not incurred when the property was originally obtained.

The purchase tax clause, as it is called, is not insisted on by all insurers and if incorporated into a policy usually applies only to property such as jewellery, furs, or other similar articles of a valuable nature.

INSURANCES ON A REINSTATEMENT BASIS

Insurance on the "reinstatement value" basis was introduced during or shortly after World War I, principally for the insurance of machinery. During that period the very rapid increase in prices often gave rise to the position that normal provision for depreciation was not sufficient to make up the difference between the cost of new machinery and the market value of the old. To meet the resulting difficulties confronting the insured when such machinery was destroyed by fire or other peril, reinstatement value insurance was devised. The concession, for such it was, was intended to be regarded as a temporary measure, bearing in mind the particular circumstances prevailing, at the time of its introduction, but for various reasons it has never been withdrawn, and today the cover is available both for buildings and contents generally, excluding stock-in-trade.

The wording at present in use is given in full hereunder, and although straightforward it is considered in some detail because so many students find it difficult to grasp its full implications.

Reinstatement Memorandum

It is hereby agreed that in the event of the property insured under the within Policy being destroyed or damaged the basis upon which the amount payable under the Policy is to be calculated shall be the reinstatement of the property destroyed or damaged, subject to the following special provisions and subject

also to the terms and conditions of the Policy except in so far as the same may be varied hereby.

For the purposes of the insurance under this memorandum "reinstatement" shall mean—

The carrying out of the after-mentioned work, namely—

(*a*) Where property is destroyed, the rebuilding of the property, if a building, or, in the case of other property, its replacement by similar property, in either case in a condition equal to but not better or more extensive than its condition when new.

(*b*) Where property is damaged, the repair of the damage and the restoration of the damaged portion of the property to a condition substantially the same as but not better or more extensive than its condition when new.

Special Provisions

1. The work of reinstatement (which may be carried out upon another site and in any manner suitable to the requirements of the Insured subject to the liability of the insurer not being thereby increased) must be commenced and carried out with reasonable dispatch; otherwise no payment beyond the amount which would have been payable under the Policy if this memorandum had not been incorporated therein shall be made.

2. When any property insured under this memorandum is damaged or destroyed in part only, the liability of the insurer shall not exceed the sum representing the cost which the insurer could have been called upon to pay for reinstatement if such property had been wholly destroyed.

3. No payment beyond the amount which would have been payable under the Policy if this memorandum had not been incorporated therein shall be made until the cost of reinstatement shall have been actually incurred.

4. Each item insured under this memorandum is declared to be separately subject to the following Condition of Average, namely—

If at the time of reinstatement the sum representing the cost which would have been incurred in reinstatement if the whole of the property covered by such Item had been destroyed, exceeds the sum insured thereon at the breaking out of any fire or at the commencement of any destruction of or damage to such property by any other peril hereby insured against, then the Insured shall be considered as being his own insurer for the excess and shall bear a rateable proportion of the loss accordingly.

5. No payment beyond the amount which would have been payable under the Policy if this memorandum had not been incorporated therein shall be made if at the time of any destruction or damage to the property insured hereunder such property shall be covered by any other insurance effected by or on behalf of the Insured which is not upon the identical basis of reinstatement set forth herein.

6. Where by reason of any of the above special provisions no payment is to be made beyond the amount which would have been payable under the Policy if this memorandum had not been incorporated therein the rights and liabilities of the insurer and the Insured in respect of the destruction or damage shall be subject to the terms and conditions of the Policy including any Condition of Average therein, as if this memorandum had not been incorporated therein.

1. Basis of Settlement

The preamble of the standard policy provides that the insurer will pay to the insured the value (e.g. market value) of the property if destroyed, or the amount of any damage sustained. The reinstatement

memorandum *substitutes* for this method of indemnity a completely different one, for "... the basis upon which the amount payable is to be calculated shall be the *reinstatement* of the property destroyed or damaged." Thus the insured is allowed to insist on reinstatement whereas under the standard policy reinstatement is at the option of the insurer.

2. The Definition of Reinstatement

The wording sets out what is meant by reinstatement and can be summarized as follows—

Destruction	Buildings — cost of rebuilding Other property — replacement by similar property	in each case to a condition equal to or substantially the same as before, *but not better or more extensive than its condition when new.*
Damage	Repair of the damage and restoration of the damaged portion	

In simple words, the reinstated property can represent "new for old," but must not be "better than before." With the constant improvements in the efficiency of machinery, it is often not possible or desirable to replace with property or portions of property identical to those destroyed or damaged, and some degree of "betterment," as it is called, is inevitable. So long as the insured receives a payment *equal to but not more* than he would have had to replace his old property by new property similar in all respects, the *intention* of the cover is maintained. In other words, the insured himself has to pay for any betterment.

3. Special Provisions

These can be roughly divided into three parts: (*a*) concessions; (*b*) limitations; (*c*) stipulations.

(*a*) CONCESSIONS (Special Provision 1 (part))

Reinstatement can be carried out

(i) on another site, if requested by the insured, or
(ii) in any manner suitable to the requirements of the insured,

provided

the liability of the insurer is not thereby increased.

These concessions are valuable, for they would enable an insured, for example, to re-plan the layout of a factory, if he so wished. Recovery under the policy would be limited to the estimated cost to reinstate the property as it was before the happening of the fire or other insured peril.

(*b*) *Limitations*

(i) Compensation for partial damage is not to exceed the estimated cost of reinstating the property concerned if it had been wholly destroyed

(Special Provision 2). Circumstances could arise where it would cost more to repair than to demolish or scrap the property and rebuild or repair.

(ii) Until reinstatement has in fact been effected, or there is evidence that the work of reinstatement is in hand and the insured is committed to its completion, the insurers will only pay an amount representing a normal indemnity, i.e. as though the reinstatement memorandum had not been added (Special Provision 3).

This limitation is important, for in its absence the insured would not necessarily expend the policy money in reinstatement, in which case the object of the reinstatement cover would be defeated.

(iii) If, because of the insured's inability to comply with one or more of the special provisions, payment is to be limited to "market value" indemnity, all the normal terms and conditions of the policy shall be held to apply. In other words the reinstatement memorandum is ignored. (Special Provision 6).

(iv) Any other insurances must be on an identical basis. If they are not, the reinstatement memorandum is held not to be operative (Special Provision 5).

It would not be possible to resolve a loss on property insured under two completely different bases of indemnity.

(*c*) STIPULATIONS

(i) Reinstatement must be carried out with reasonable dispatch. If it is not, the ordinary provisions of the policy will be held to apply (Special Provision 1 (part)).

At one time, reinstatement had to be commenced within twelve months, but the time limit has now been replaced by the words "reasonable dispatch." The meaning of reasonable has already been discussed when dealing with the standard policy conditions and would be a matter for decision by the courts if insured and insurer were unable to agree on this. It is right that this stipulation should be included, if only to ensure that reinstatement is not unduly delayed. The longer it is left, the more difficult will be the settlement, for there may be continual depreciation in the damaged property.

(ii) The sum insured is subject to a form of average (Special Provision 4).

From the student's point of view it is unfortunate that the first line of this provision merely refers to "the following Condition of Average," because it is clear that students do not read the words of the average condition itself and assume it to be the ordinary *pro rata* condition. The opening words of the reinstatement average condition, however, show at once that there is a fundamental difference: "If at the *time of reinstatement* the cost . . ." and later ". . . exceeds the sum insured . . .

at the *breaking out of any fire* . . . ." There are thus two time factors involved, whereas the ordinary *pro rata* condition of average refers to one time only—the date of the fire.

Average, therefore, under the reinstatement memorandum is applied on the basis of

$$\frac{\text{Sum insured at time of fire}}{\text{Cost of reinstatement at time of reinstatement}} \times \text{Loss}$$

In times of inflation, this form of average can penalize an insured who delays reinstatement, as will be seen from the following illustration based on a claim dealt with in practice.

After a serious fire in 1951, the insured obtained the agreement of the insurer to postpone reinstatement, first because there was difficulty in obtaining replacement machinery at the time, and secondly because at a later date the insured decided to move to a new factory. The cost of reinstatement was finally agreed at £6,951, but the work was not completed until 1956, by which time it was agreed that the cost of reinstating all the property concerned would have been £8,081 compared with a sum insured of £7,000 which was adequate at the time of the fire.

The total amount due to the insured under the terms of the reinstatement memorandum was therefore—

$$\frac{7{,}000}{8{,}081} \times £6{,}951, \text{ i.e. } £6{,}021$$

If the policy has been extended to include employees' and/or directors' effects (e.g. by the incorporation of the "All Other Contents" memorandum), it is not the intention to apply the "new for old" basis of settlement to such property. Steps are therefore taken to amend the reinstatement memorandum accordingly, and this is done by endorsing the policy to the effect that "in respect of the insurance on employees' and directors' effects the basis of settlement and of valuation for the purpose of the application of average shall be the value of such effects at the time of loss and not the cost of reinstatement or replacement in new condition."

REINSTATEMENT — PUBLIC AUTHORITIES

The majority of local authorities have their own bye-laws, which stipulate certain forms of construction, and in some circumstances they can insist that the property damaged by fire shall be reinstated in a different manner or with different materials, often at extra cost so far as the property owner is concerned. Examples include the substitution of an incombustible staircase in place of a wooden one, or the replacement of a timber and asbestos wall by one of brick. If the property is

seriously damaged or destroyed, the owner may be compelled to rebuild in an entirely different manner or even rebuild elsewhere.

This extra cost, if incurred, can be insured, and the wording at present in use is as follows—

REINSTATEMENT MEMORANDUM (PUBLIC AUTHORITIES)

The insurance by this Policy extends to include such additional cost of reinstatement of the destroyed or damaged property thereby insured as may be incurred solely by reason of the necessity to comply with Building or other Regulations under or framed in pursuance of any Act of Parliament or with Bye-laws of any Municipal or Local Authority provided that—

1. The amount recoverable under this Extension shall not include—

(*a*) the cost incurred in complying with any of the aforesaid Regulations or Bye-laws

(i) in respect of destruction or damage occurring prior to the granting of this Extension,

(ii) in respect of destruction or damage not insured by the Policy,

(iii) under which notice has been served upon the Insured prior to the happening of the destruction or damage,

(iv) in respect of undamaged property or undamaged portions of property;

(*b*) the additional cost that would have been required to make good the property damaged or destroyed to a condition equal to its condition when new had the necessity to comply with any of the aforesaid Regulations or Bye-laws not arisen;

(*c*) the amount of any rate tax duty development or other charge or assessment arising out of capital appreciation which may be payable in respect of the property or by the owner thereof by reason of compliance with any of the aforesaid Regulations or Bye-laws;

2. The work of reinstatement must be commenced and carried out with reasonable dispatch and in any case must be completed within twelve months after the destruction or damage or within such further time as the insurer may (during the said twelve months) in writing allow and may be carried out wholly or partially upon another site (if the aforesaid Regulations or Bye-laws so necessitate) subject to the liability of the insurer under this Extension not being thereby increased:

3. If the liability of the insurer under (any item of) the Policy apart from this Extension shall be reduced by the application of any of the terms and conditions of the Policy then the liability of the insurer under this Extension (in respect of any such item) shall be reduced in like proportion:

4. The total amount recoverable under any item of the Policy shall not exceed the sum insured thereby:

5. All the conditions of the Policy except in so far as they may be hereby expressly varied shall apply as if they had been incorporated herein.

To some extent the wording is based on that in use for the ordinary reinstatement memorandum, but there are several important differences which the claims official must note. A summary of the memorandum is given below—

(*a*) *Exclusions.* These are set out and call for no particular comment. (Para. 1).

(*b*) *Concessions.* (i) Reinstatement may be carried out on another

site if so decided, provided the liability of the insurer is not thereby increased (Para. 2 (part)).

(ii) New for old is allowed (Para. 1(*b*)).

(*c*) *Limitations.* (i) Any terms and conditions, e.g. average, which have the effect of reducing liability under the policy (apart from the extension) shall apply equally to the extension (Para. 3).

(ii) Apart from any express variation, all the conditions in the policy shall apply to the extension (Para. 5).

(iii) No more than the sum insured can be recovered in respect of any loss (Para. 4).

(*d*) *Stipulations.* The work of reinstatement must be carried out with reasonable dispatch and completed within twelve months of the date of the damage, unless during such time the insurer agrees in writing to an extension (Para. 2 (part)).

The following extract from an adjuster's report gives an example of the operation of the memorandum.

> The north-west gable end of the building comprised an external wall of steel framing clad externally with corrugated asbestos sheeting and the prices we had already agreed included £754 5s. 3d. in respect of this wall.
>
> The Borough Engineer's Department of the . . . Council required the insured to reconstruct this wall in materials which would provide a 4-hour fire resistance. In order to comply with this requirement the wall must be rebuilt in brickwork with suitable fire-resisting doors. The cost of the wall required by the Local Authority is agreed at £1,670 0s. 3d., and by offsetting the amount allowed for notional reconstruction (i.e. £754 5s. 3d.) the additional charge of £915 15s. is agreed with the Surveyor and the contractor and is covered by the provisions of the Reinstatement Memorandum (Public Authorities).

CHAPTER 12

OTHER FORMS OF COVER

SPRINKLER LEAKAGE

Sprinkler installations are erected in buildings to provide automatic extinguishment in the event of fire, and the system is so arranged that it should operate only on the outbreak of fire. For a variety of causes, the commonest being the accidental displacement of a sprinkler head, water is sometimes discharged from the installation when there is no fire, and it is the consequent damage that the sprinkler leakage policy covers. The policy insures loss or damage caused by the accidental discharge or leakage of water from the automatic sprinkler installation, provided such loss or damage is not occasioned by or happens through—

(*a*) heat caused by fire;

(*b*) repairs, alterations or extensions to the premises or the installation itself;

(*c*) freezing due to the premises being vacant or unoccupied or due to the *neglect* of the insured;

(*d*) defects in construction or condition *of which the insured is aware*;

(*e*) explosion, the blowing-up of buildings or blasting;

(*f*) the order of the Government or any competent authority;

(*g*) volcanic eruptions, earthquake, subterranean fire, riot and civil commotion;

(*h*) war risks.

Most of the exclusions are self-explanatory; (*a*), (*e*) and (*g*) refer to damage which should be covered by fire or other policies or extensions. Volcanic eruption may seem a strange exclusion so far as Great Britain is concerned, but it is believed to have been retained in the wording following its introduction here from abroad. Exclusions (*b*), (*c*) and (*d*) relate to circumstances which tend to increase the risk considerably or even make it uninsurable.

The policy conditions follow those in the standard policy, with the following additions—

(*a*) Damage to the installation itself is not covered.

(*b*) The insured must maintain the installation in proper working order.

(*c*) The insured must give notice *before* any changes are made to the installation.

(*d*) The insurer shall have access to the premises at all reasonable times for the purposes of inspection.

MOTOR GARAGES (PUBLIC LIABILITY)

These policies indemnify garage proprietors against sums which they may become legally liable to pay for loss or damage by fire or explosion to motor vehicles, and accessories belonging thereto, held in trust for which they are responsible, caused through their *negligence* or that of their employees or through any defect in the works, machinery, or plant on the premises concerned. Litigation expenses incurred with the insurers' consent in defending the claim are also covered. Negligence must be proved by the injured party before any liability can be admitted.

The following additional features should be noted.

(*a*) The insurers can, at any time, if they so wish, relieve themselves of any further liability on account of litigation expenses upon paying their established liability together with expenses incurred up to that time.

(*b*) As the premium is based on the garage capacity i.e. the maximum number of vehicles that can be accommodated in the premises (including any covered yards), the insurers must be informed immediately of any extension or alteration to the premises.

(*c*) The insured warrants to advise the insurers of any alteration involving an increase in risk or change in the fire rate.

(*d*) All property must be maintained in good repair and safeguarded from loss or damage.

(*e*) No admission of liability may be made by the insured without the written consent of the insurers.

Claims made under this type of policy usually arise through the negligence of garage employees, e.g. the use of naked or unsafe lights in or near a concentration of petrol vapour. Once negligence is proved (in many cases the evidence is prima facie) the insurer is liable to meet claims made upon the insured up to the limit of the sum insured. In addition to the material damage to the property of third parties, the policy would probably cover claims made by such parties for loss of use, since the policy extends to cover the whole of the insured's legal liability to third parties to pay compensation arising out of the event and consequential loss of this nature is not specifically excluded.

HAILSTORM

Hailstorms can cause considerable damage, and are particularly prevalent in certain parts of the country. Special policies are available to cover loss or damage so caused to glass in glasshouses and the like, and to agricultural crops. Both types of policy are contracts of indemnity.

Breakage of Glass caused by Hail

Although there is no uniform policy, terms and conditions do not vary much as between one insurer and another. A separate item is usually required for each building or range of buildings, glass being insured for a sum calculated by multiplying the total area in square

feet of glass by the replacement value per square foot for the particular type of glass covered. The type of glass is specified and payment in the event of a claim limited to so much per square foot. The peril covered is usually defined as "breakage caused by hail."

Conditions, where applicable, follow closely those in the standard policy. The policy incorporates no condition of average as such, but one of the conditions stipulates that if part only of the glass is covered, that part must be accurately described so that in the event of loss, payment will be confined to that particular area.

The incorporation into the contract of an agreed basis of settlement appears to make the policy a valued one, but although, in the event of loss, settlement is usually based on the figure named, the insurer might elect to reinstate the damage if to do so would be cheaper.

Sometimes the figure chosen for the basis of glass replacement is increased by an arbitrary amount, e.g. 1s. or 2s. per square foot, to meet the cost (or partial cost) of loss of contents. Such a loss could arise, not only from material damage but by a drop in temperature resulting in the death or deterioration of the plants inside the greenhouse.

In the event of loss, the insured notifies the insurer accordingly and submits a claim based on the area in square feet of glass broken, multiplied by the agreed amount per square foot (including any additional amount for contents if so insured). If the damage is extensive the insurer might investigate the claim, but usually settles on the figure submitted once it is found to be correct.

Hail Damage to Agricultural Crops

Here, too, there is no uniform policy, but most insurers have adopted similar terms and conditions. The "hail crops" policy is unusual in many respects.

1. The proposal is incorporated into the policy to form the basis of the contract.

2. The period covered is from an agreed date until the crop is harvested, when cover automatically ceases.

3. The subject-matter of the policy has to be carefully specified and incorporates the estimated yield and values of the crop, the sum insured being based on the estimated value. On the assumption, for example, that insurance is wanted for a 10-acre field of peas, the property covered might read as follows—

Description of crop	Peas
Acres........................	10
Estimated yield per acre	20 cwt.
Estimated value per cwt.	50s.
Estimated value per crop	£500 (i.e. 10 × 20 × 50s.)
Sum insured per crop..........	£500

Claims are settled in one of two ways; by adjustment at or soon after the loss, or by leaving the adjustment until the crop is harvested. Each method can have advantages or disadvantages. If settlement is postponed, the crop, if not too badly damaged, may recover to some extent and so lessen the loss. On the other hand, general weather conditions may retard recovery, with the result that the loss may be increased or eventual settlement made complicated. On balance, it is probably preferable not to postpone settlement, although differences of opinion may arise as to the amount of the loss, which is usually based on reduction, actual or estimated, in yield. The following details are based on practical claims.

1. *Claims settled at time of loss*

1 Crop	2 Acreage involved	3 Estimated pre-damage yield per acre	4 Loss attributable to hail per acre	5 Price per unit	6 Loss	7 Remarks
Barley	8	35 cwt.	3 cwt.	25s. cwt.	£30	Col. 3 is used to gauge the estimated reduction in yield.
Oats	10	25 ,,	1 ,,	25s. ,,	£12 10s.	
Peas	25	13 ,,	4 ,,	50s. ,,	£250	
Sugar Beet	70	20 tons	8 ,,	£5 ton	£140	

2. *Claims where settlement deferred until after harvesting*

Crop	Acreage involved	Estimated pre-damage yield per acre	Actual yield at harvest	Deficiency	Price per unit	Loss	Remarks
Barley	$16\frac{1}{2}$	32 cwt.	17 cwt.	15 cwt.	21s.	£259 17s. 6d.	Reduced by $\frac{2}{3}$ to £86 12s. 6d. as further damage was later caused by severe weather conditions other than hail. It was decided that $\frac{1}{3}$ of the reduced yield was due to hail.
Oats	6	24 cwt.	$10\frac{1}{2}$ cwt.	$13\frac{1}{2}$ cwt.	19s.	£76 19s.	

Subject to adequate sums insured, growers are entitled to claim

additional amounts under the Deficiency Payment Scheme (see p. 45) in the same way as they do in respect of fire damage.

Of the policy conditions, several are peculiar to this type of contract and can be summarized as follows—

1. Damage or injury by wind, water, or causes other than by *hail* is not covered.
2. The entire crop is assumed to be insured unless otherwise agreed, when the part only insured is specifically described.
3. Average is applicable and is based on a comparison of the sum insured with the value of the crop reasonably estimated at the time of proposal.
4. The crops must not have sustained any injury by hail before the proposal is made, and the insurer is not liable for any damage occurring to the crops before the proposal is received by the head office or the branch of the insurer concerned. Any agent is to be considered as agent to the insured for that purpose.
5. Straw is excluded, unless expressly covered.
6. Notification of any damage is to be given within *four days*, stating also the time of the storm and specifying the crop involved. Unless this is done the insured forfeits all right to claim.

The other conditions include those applicable to misdescription, contribution, fraud, alteration in terms, and arbitration.

EXTENSIONS OF COVER TO OTHER PREMISES

The object of extension clauses is to cover property temporarily removed from the premises where it is normally housed. Probably the earliest extension clause was that applicable to household and personal effects, whereby such property is covered, with certain reservations, for an amount not exceeding 15 per cent of the sum insured while temporarily removed from the insured's dwelling-house. Other temporary removal clauses have since been introduced to meet the needs of trade, industry, and the farmer, and these clauses are now considered.

1. Household Goods

This clause is dealt with on p. 218.

2. The Temporary Removal Clause

This clause is now in general use for both trade and industry, and extends the policy to cover property insured while temporarily removed for cleaning, renovation, repair, or other similar purposes. The following are the main features covered by the clause.

(*a*) The extension *does not apply* to stock-in-trade or merchandise or to property if and so far as it is otherwise insured.

(*b*) The removal can be from one building to another on the same

premises or to any other premises in Great Britain, Ireland, and Northern Ireland.

(*c*) Loss or damage during transit between the two points is covered, provided it is by road, rail, or inland waterway.

(*d*) The amount recoverable in respect of each item shall not exceed—

(i) the amount that would have been recoverable if the loss had occurred in that part of the premises from which the property was temporarily removed, nor,

(ii) in respect of any loss occurring away from the insured premises 10 per cent of the sum insured by the item, after deducting therefrom the value of any building (*exclusive* of fittings and fixtures), stock-in-trade, or merchandise *insured thereby*. (This would apply only to items of a "blanket" type.)

(*e*) In respect only of losses occurring elsewhere than at the insured premises, the extension does not apply to motor vehicles and motor chassis (licensed for normal road use), nor to property held in trust (other than machinery and plant).

3. Extension to Premises of Machine Makers, etc.

Many industrial firms need cover, additional to that described above, for their property—usually stock—while on premises other than those they occupy. Such property, for example, may be sent to various firms for partial processing, to sub-contractors, or on approval to customers. It is usually possible for the firm concerned to decide on a maximum amount likely to be at risk at any one time at all such other premises, and cover is therefore arranged on this basis, i.e. by allocating an amount (referred to as the maximum liability) to apply to such property, the amount being part of the sum insured in force at the insured premises from which the extension is granted. In addition to the overall maximum liability for all outside premises, a maximum liability is fixed for any one location. Average is applied by comparing the maximum liability with the value of the property at risk under the extension. The amount payable is not to exceed the maximum liability fixed for any one location.

Example—

Maximum liability over all	£50,000
" " any one location ..	£5,000
Loss	£6,000
Value at risk at all locations at time of loss	£55,000

Average applies on the basis of $\frac{50000}{55000}$ so that the insurers' initial liability is $\frac{50}{55} \times$ £6,000 = £5,454. As, however, this exceeds the limit at any one location, the insurers' liability is reduced to £5,000.

4. Farming Stock

Certain farming stock is also held covered while temporarily removed to other premises in Great Britain, Ireland and Northern Ireland as follows—

(*a*) Vehicles and implements and utensils of husbandry, if and so far as not otherwise insured.

(*b*) Grain, if and so far as not otherwise insured, removed for drying.

In addition to the foregoing, agricultural produce, farming stock, implements, and utensils of husbandry are covered while in transit by road, rail, or inland waterway, and livestock is similarly covered while in transit or while in the open or in buildings elsewhere than on any farm in the insured's occupation.

5. Office Contents Temporarily Removed

Many firms, particularly solicitors, send away various documents, such as deeds, plans, manuscripts and the like to the premises of other people, and this extension covers such property while so removed up to a limit of 10 per cent of the relative sum insured. The extension is confined to Great Britain, Ireland, and Northern Ireland, and the usual transit risks are included.

If the property temporarily removed and covered by any of these extensions is also insured by the firms or people to whose premises the property has been removed, e.g. as goods in trust, contribution will usually apply in the event of loss. The independent liability method is used. (See Chapter 9.)

FIRE POLICIES ON PRIVATE DWELLINGS

The use of the standard form of policy is not obligatory for insurances covering the buildings, rent or contents of private dwellings, and the majority, if not all, insurers use their own special form for this purpose. These particular policies are not necessarily uniform either in cover or conditions, but there is a basic similarity throughout and, generally, the following features are common to most.

1. Perils Covered

Fire, lightning, thunderbolt, explosion (unqualified) subterranean fire (not included by all insurers); and fire only caused by (*a*) riot or civil commotion (excluding Eire and Northern Ireland) and (*b*) earthquake.

So far as contents only are concerned, the cover usually extends to include *all* earthquake damage, i.e. by fire and shock.

The comments already made on the corresponding perils in the standard fire policy or the extra perils which can be added thereto apply

equally here, except that there is no obligation to give seven days' notice of riot damage. Thunderbolt is a hitherto unmentioned peril, for which there is no single definition. The word is sometimes colloquially used to describe the effect of lightning, e.g. struck by a thunderbolt, or may be used as an alternative to a meteorite.

2. The Property Insured

(*a*) The Buildings

The wording is usually on the lines of the comprehensive policy (q.v.).

(*b*) The Contents

The wording varies considerably, but usually refers to household goods and personal effects of every description (excluding money, securities, stamps, documents, manuscripts, and books of account), the property of the insured, his family and domestic servants. A limit of 5 per cent applies to any one picture, print, or engraving.

The contents are covered against the specified perils while temporarily removed (unless otherwise insured) to any address in Great Britain, Ireland, and Northern Ireland, subject to the following limitations.

(i) The extension does not apply to property removed for sale or exhibition or to a furniture depository.

(ii) Cover is limited to 15 per cent of the sum insured.

(iii) The value of the property so removed or 15 per cent of the sum insured (whichever is the less) ceases to apply to contents of the dwelling during the period of temporary removal.

(*c*) Rent

The usual wording and conditions apply.

3. Conditions

These are basically similar to those applicable to comprehensive policies, which are now considered.

HOUSEHOLDERS'[1] POLICIES

The householders' policy, first issued during World War I, has since been widened considerably in scope and today gives the house owner or householder protection against many everyday happenings. There are two basic policies, one for buildings and one for contents, i.e. household furniture and personal effects, and each is considered independently so far as it relates to cover normally dealt with in the fire department. Both policies, however, incorporate the common features which are described in the following pages.

[1]Also known as Comprehensive, All-in, Hearth and Home, etc., policies.

1. Declaration of Full Value

The signed proposal, including a declaration that the sum insured, whether on building or contents or both, represents not less than the full value of the property, is incorporated into and forms the basis of the contract. So far as the proposal form generally is concerned, its incorporation has the usual effect, i.e. it becomes an integral part of the contract, but the declaration of full value is not so easy of interpretation. The declaration would undoubtedly have some effect if it were proved to have been wilfully inaccurate when signed, but although it should be possible to reach a fairly reasonable figure in respect of the building, it is by no means easy to arrive at even an approximate figure to cover the full value of the contents, the majority of which would, in any event, be second-hand. An element of good faith enters into the computation of the figure, which could vary considerably according to the ideas and knowledge of the insured. The value to the insurers of the declaration has never been tested in the courts but the comments made by two judges in *West* v. *National Motor & Accident Insurance Union Ltd.*, [1955] 1 All E.R. 800, are interesting.

The case related to a burglary claim, and although the insurers confirmed the policy, they repudiated the claim on the ground that in taking up the policy the plaintiff had misrepresented or failed to disclose the full value of the contents of his house covered by the policy, which was taken out in 1949 for a sum insured of £500. It was estimated that at the time of the burglary in 1953 the contents of the house were valued at about £2,000. The dispute originally went to arbitration, but the arbitrator referred the following question to the court: Whether on the facts stated and the admissions made the respondents, having chosen to confirm the insurance policy, were entitled to repudiate the claim on the ground of admitted misrepresentation or non-disclosure by the claimant. The case went to the Queen's Bench Division, and, in his judgment, Lord Goddard said that if it were shown that there was material misrepresentation in the proposal form (and this was not fraud), the company were entitled to repudiate the policy. It was extremely difficult to see how they could repudiate the claim if it fell within the terms of the policy, unless they had disclaimed the policy. In the proposal form Mr. West was required to state the full value of the contents of the house. Obviously, what he meant to do was to have an insurance up to £500 so that, if he suffered any loss, he would be able to claim up to that amount. "I wonder how people of the working class could know or say what was the value of their property in the house," his Lordship said. "How could they calculate? By what they paid for it or by the price to be obtained at an auction? It is extraordinary

to say anyone could do it at any particular moment." The result of the case was that the Company were held liable.

The case then went to appeal and Lord Goddard's judgment was upheld. Singleton, L.J., said "... the company might have repudiated the policy [based on the failure of the plaintiff to disclose the full value of the contents]. *I do not know if they would have succeeded.*"

These remarks made by two leading judges emphasize the difficulty which would confront an insurer who might try to avoid liability by relying on an inaccurate declaration, and the position is not helped by the fact that it is by no means certain that the declaration is a continuing one, i.e. reaffirmed at each renewal.

In the event of serious under-insurance it is understood that some insurers apply a form of average, i.e. pay such an amount of the loss as the sum insured bears to the estimated value at risk. There are no legal grounds whatever for such an action. The policy contains no condition of average, and the only courses available to the insurer in a case such as this would be to repudiate liability entirely or pay the agreed amount of the claim in full. To introduce at will into a contract a different basis of settlement is entirely wrong and can command no legal support.

2. Preamble

This is much on the lines of the standard form of policy, indemnity being given by "payment, reinstatement or repair." There is no reference to value, but the insurer is held liable to ". . . . indemnify the insured . . . ."

3. Conditions

(*a*) The customary "war risks" and "radioactive contamination" wordings are incorporated.

(*b*) There is a contribution clause, based on rateable proportions. There is no reference to average.

(*c*) *Claims procedure.* The insured has to give—

(i) immediate notice in writing;

(ii) full details in writing within thirty days;

(iii) all plans, specifications and quantities if the insurer elects or becomes bound to reinstate.

(*d*) *Rights of insurer*—

(i) to enter any building affected;

(ii) to keep possession of property and to deal with salvage in a reasonable manner;

(iii) the insured cannot abandon salvage.

(*e*) *Fraud.* The insured forfeits all benefit.

(*f*) *Arbitration.* Usual wording.

(*g*) (*Buildings only*). Contracting Purchaser's Clause.

The comments already made about the corresponding conditions in the standard fire policy apply equally here.

4. Maximum Liability

The total liability in respect of loss or damage *by all or any of the perils* during any one period of insurance shall not exceed the sum insured by any item affected or in the aggregate the total sum insured. This follows the corresponding limitation imposed when a fire policy is extended to include other perils.

The Buildings Policy

1. *The property insured* comprises the house, and all the domestic buildings which can be of any construction. The house itself must be of normal construction (i.e. brick, stone, or concrete built with an incombustible roof) unless otherwise stated. Walls, gates, and fences belonging thereto are also included.

2. *The perils covered*, i.e. those usually dealt with by the fire department—

Loss or damage to the buildings caused by—

(*a*) Fire, explosion (unqualified), lightning, thunderbolt.

(*b*) Riot, civil commotion, strikes, labour disturbances, or malicious persons acting on behalf of or in connexion with any political organization (Eire and Northern Ireland excluded).

(*c*) Aircraft and other aerial devices or articles dropped therefrom.

(*d*) Storm, tempest and flood excluding—

(i) destruction or damage by subsidence, or landslip;

(ii) destruction of or damage to fences and gates; and

(iii) the first £5 of each and every loss (unless deleted at an additional premium).

If damage by flood is excluded, this section is altered to read—

(*d*) Storm or tempest excluding—

(i) destruction or damage by

(*a*) the escape of water from the normal confines of any natural or artificial water course (other than water tanks, apparatus or pipes) or lake, reservoir, canal or dam

(*b*) inundation from the sea

whether resulting from storm or tempest or otherwise,

(ii) destruction or damage by subsidence or landslip,

(iii) destruction of or damage to fences and gates, and

(iv) the first £5 of each and every loss (unless deleted at an additional premium).

(*e*) Bursting or overflowing of water tanks, apparatus, or pipes, excluding—

(i) the first £5 of each and every loss (unless deleted at an additional premium);

(ii) destruction or damage occurring while the private dwelling-house is left unfurnished.

(*f*) Earthquake.

(*g*) Impact with any of the insured buildings by any road vehicle, horses, or cattle not belonging to the insured or under the control of the insured or any member of his family residing with him.

(*h*) Breakage or collapse of television and radio receiving aerials, aerial fittings, and masts. (Damage caused by breakage or collapse of radio *transmitting* aerials is not covered.)

(*i*) Leakage of oil from any fixed oil-fired heating installation.

The comments already made on the corresponding perils covered by the standard fire policy or to the extra perils which can be added thereto apply equally here (except that there is no reference to notice within seven days for riot damage) and any differences are self-explanatory.

Damage to the buildings caused by the breakage or collapse of aerials or masts is a recent extension. Generally, there is no liability for damage to the aerial or similar apparatus itself. If the damage is due to storm or tempest the claim is dealt with under this heading and the £5 excess (unless deleted) applies.

3. *Extensions*—

(*a*) *Loss of rent* is covered up to 10 per cent of the sum insured—

(i) if the house is rendered uninhabitable, and then

(ii) only for the period necessary for reinstatement.

No time limit in months is imposed, and any amount payable for rent is *in addition* to that payable for damage to the building. If, therefore, the building is a total loss and rent is also claimed, more than the sum insured can be paid.

(*b*) *Accidental damage to underground water or gas pipes and electricity cables.* The damage must be *accidental*, so that damage through normal depreciation would not be covered. The insured must be responsible for such damage, and the pipes or cables are confined to that stretch of piping or cabling from the house to the public mains. Examples of accidental damage include the severing or fracture of pipes or cables by pick or spade; the fracture of water pipes by intensive frost and occasionally by the action of tree roots.

(*c*) *Breakage of fixed glass* (e.g. in windows, skylights, greenhouses, etc.) and of sanitary fixtures (e.g. wash basins, sinks, lavatory pans, etc.). The following should be noted—

(i) Cover is not operative while the house is left unfurnished.

(ii) There is an excess of £1 for fixed glass in greenhouses, conservatories and verandas. If, therefore, such glass is damaged by

storm only £1 can be deducted, but the normal excess of £5 (unless deleted) will apply to other parts of the building. If both the greenhouse and the house itself are damaged, it would seem unfair to deduct both excesses, i.e. £1 *plus* £5, and most insurers would probably apply the higher excess, namely £5, only.

Few difficulties arise in claim settlements. Occasionally, insurers have to pay for a matching pair, e.g. a basin and lavatory pan, if one unit only is broken and a matching replacement cannot be obtained. Claims are sometimes received for damage caused by the units being chipped, although not broken, and such cases can only be treated on their merits. The practice of insurers is not uniform.

The Contents Policy

1. *The property insured* comprises household goods and personal effects of every description, the property of the insured (or for which he is responsible) or of members of his family *permanently residing with him*, subject to the following—

(*a*) *Inclusions*—

(i) Cash, currency notes, bank notes, and stamps (not part of a stamp collection) for an amount not exceeding £50 or 5 per cent of the sum insured, whichever is the less.

(ii) Tenants' fixtures and fittings (or for which he is responsible) but *not* landlords' fixtures and fittings, except as hereafter mentioned.

(*b*) *Exclusions*—

(i) The structure, ceiling, wall paper, and the like, except as specially mentioned.

(ii) Property more specifically insured.

(iii) Securities and documents of various kinds; manuscripts; medals and coins; motor vehicles and accessories thereon; livestock (other than horses) unless specially mentioned.

(*c*) *Limitations*—

(i) Unless separately insured, no one curio, picture, or other work of art, stamp collection, article of gold, silver, or other precious metal, jewellery, or fur shall be deemed of greater value than 5 per cent of the sum insured unless separately insured.

(ii) The total value of articles of precious metals, jewellery, or furs shall be deemed not to exceed one-third of the sum insured, unless otherwise agreed.

2. *The perils covered* are the same as those specified for the "Buildings" with the following differences—

(*a*) Flood is always *included* with *storm and tempest*, and there are no exclusions nor excess as in the building policy;

(*b*) There is no excess for "burst pipes," but damage to such

apparatus itself is not covered. This would come under the building policy if the building is owned by the insured. If he is responsible as tenant, cover is operative as hereafter mentioned.

3. *Extensions—*

(*a*) *Temporary removal—*

The contents are covered against all the specified perils while temporarily removed to any place in Great Britain, Ireland, or Northern Ireland subject to the following—

(i) Furniture depositories or property removed for sale or exhibition are excluded from the extension.

(ii) Property in transit or on the person is not covered against storm, tempest, or flood.

(iii) There is a limit of 15 per cent of the sum insured in respect only of fire, explosion, lightning, thunderbolt, and earthquake.

(*b*) *Servants' goods—*

If not otherwise insured, clothing and personal goods (*excluding* cash, currency and bank notes, and stamps) of the insured's domestic servants are covered against all the specified perils whilst in—

(i) the insured's private dwelling; or

(ii) any private dwelling, boarding or lodging house, hotel or inn in Great Britain, Ireland, or Northern Ireland, provided such servants are residing there with the insured or any member of his family.

In the absence of any memorandum to the contrary, any loss payable in respect of servants' goods is additional to the agreed amount of loss under the contents sums insured.

(*c*) *Accidental breakage of mirrors and glass—*

Included in the cover are mirrors, plate glass tops to and fixed glass in furniture (excluding television and radio sets) while in the insured's dwelling.

(*d*) *Tenants' liability—*

This covers all sums for which the insured is (legally) liable as *tenant* (e.g. under the terms of a lease) and not as owner for—

(1) Damage (*excluding fire damage*) caused by—

(*a*) Storm, tempest and flood, excluding subsidence, landslip and the first £5 (unless deleted) of each loss;

(*b*) Bursting or overflowing of water tanks, apparatus, or pipes excluding the first £5 (unless deleted) as above.

(*c*) Breakage or collapse of television and radio receiving aerials, aerial fittings, and masts

to

the private dwelling, outbuildings belonging thereto or to landlords' fixtures or fittings therein or thereon *subject to an overall limit of 10 per cent of the sum insured.*

(2) Leakage of oil. (3) Accidental breakage of fixed glass. (4) Repair of accidental damage to the underground water or gas pipes or electricity cable.	as set out under buildings policy.

N.B. The extension (apart from (4)) does not apply if the dwelling is left unfurnished.

This is an important extension and calls for the following comments—

(i) If, in the event of a claim, it is found that the dwelling is also insured on the same basis by the landlord, steps should be taken to see upon which party primary liability rests, or else to arrange for contribution, if both insurers are parties to the F.O.C. Rules.[1]

The work involved, however, in pursuing the necessary inquiries each time such a loss occurred would be out of all proportion to the advantage gained, and most insurers have unofficially agreed among themselves to accept claims of this type without seeking contribution. Thus, if the building insurer receives the claim, it will be met, subject to the normal terms and conditions of the policy, without inquiring as to the liability of the tenant. Similarly, if the contents insurer receives the claim, it will be met as above, provided it is established that the tenant is, in fact, liable to make good the damage. If, notwithstanding this unofficial agreement, it is decided to apportion the loss, the independent liability method is suggested.

(ii) The cover applicable to television and radio aerials, etc., relates only to damage caused to the buildings, and there is no liability for damage to the aerials themselves. If the damage is caused by storm or tempest, any excess can only be applied to property other than the aerial, etc., since the aerial is regarded as a tenant's fixture or fitting and as such comes under the "Contents" item for which there is no excess for storm or tempest.

(iii) If there is in force a special television or similar policy, this would be primarily liable for any damage coming within its scope, and the householders' policy would not normally contribute, since it does not cover property more specifically insured.

(iv) Similar remarks to those made under the buildings policy apply to accidental breakage of glass.

(*e*) *Loss of rent*—

This is in two parts—

(i) Loss of rent (ii) reasonable additional expenses necessarily incurred by the insured at an hotel, lodging or boarding house	if the dwelling is so damaged by any of the specified perils as to be rendered uninhabitable.

[1] See p. 133

There are two limitations—

(i) A time limit based on the period necessary for reinstatement, and

(ii) a maximum recovery of 10 per cent of the sum insured.

In connexion with the cover for additional expenses, the insured must give credit for the saving he makes by being temporarily absent from his own home. For example, while he is living in a hotel, he will not have to buy food for the household and will save money on lighting and heating, domestic help and possibly obtain temporary relief from local rates. Thus, a claim for £58 16s. to cover the cost of an insured and his wife living at an hotel for four weeks at £7 7s. each a week might be adjusted as follows—

		£	s.
Additional expenses at hotel while house being repaired—four weeks @ £14 14s. per week		58	16
	£		
Less saving on Food	16		
Lighting/heating	4		
Domestic help	4	24	–
Adjusted amount ..		34	16

Provided this was within the 10 per cent limit, the adjusted amount would be paid.

It sometimes happens that following serious damage the 10 per cent limit is inadequate to meet the adjusted amount of additional expenses. If the building is also insured on the same basis and the damage is covered thereby, the building policy, loss of rent section, can be utilized to make up part or the whole of the deficiency depending on any payment already made by that policy. This step can be taken whether the building and contents are insured separately or by the same policy, since either method gives both extensions, namely, 10 per cent for loss of rent and 10 per cent for additional expenses. If the property has never been let and consequently no rental fixed, a figure is usually agreed between insured and insurer (or adjuster).

(*f*) *Death benefits*—

A sum of £1,000 or one-half of the sum insured, *whichever is the less*, is payable to the insured, or to the husband or wife of the insured, in the event of any of them receiving fatal injury caused by fire, provided death ensues within three calendar months of such injury. Any payment is additional to any other agreed amount of damage falling within the policy terms. Such payments are unhappily not infrequent and relate mainly to elderly people.

Death caused by fire would be the subject of a Coroner's inquest

(inquiry into the cause of all deaths, within the Coroner's district, by violent or unnatural means) and the insurer would normally abide by the verdict reached. As a rule, claim settlements under this heading are straightforward. The only difficulty sometimes encountered is where death might have occurred either before or after the fire, e.g. collapse leading to the overturning of an oil stove. The medical evidence available in such a case would then have to be carefully considered to enable the insurer to decide whether to admit liability or not.

APPENDIX A

Loss Ref.

CLAIM FORM

Fire Dept.

Claim for Loss Under Policy No.................................

1. Name and Address of Insured.	
2. Address at which the damage occurred.	
3. Date and Time of occurrence.	
4. Cause of the damage (i.e. Fire, Storm, Bursting of pipes, etc.) *N.B.* In case of fire the exact cause of the outbreak should be clearly stated.	
5. If the claim is in respect of the building please state whether the property is held as Lessee, Lessor, Mortgagee, Mortgagor or Sole Owner.	
6. Are there any other insurances upon the same property? If so, please state name of Insurers and Policy Nos. if known.	

I declare that the property detailed overleaf belonging to me and insured under the above policy was destroyed or damaged as stated and in consequence a claim is hereby made for the sum or sums stated herein; and I further declare that no other person except..has any interest in the said property.

As witness my hand this..day of.......................19.......

Signature of Claimant...

IMPORTANT. This form should be completed and forwarded to the Insurer as soon as possible and in no case later than 30 days from the date of the occurrence. Claimants are advised to read the conditions of the Insurer's policies regarding claims before completing this form.

PARTICULARS OF CLAIM

Full description of each item of property damaged or destroyed	Original Cost Price	Date of Purchase	Value immediately previous to the damage	Value of Salvage	Amount claimed after deduction of salvage and allowance for depreciation	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)
				TOTAL SUM CLAIMED £		

NOTES

BUILDING claims, including damage to decorations, should be based on a detailed Builder's estimate and columns (2) – (5) need not be completed.

CONTENTS claims. All columns should be completed and an indication of the extent of the damage given. If any of the items are capable of repair the claim should be based on a tradesman's estimate. Cost prices at the time of the loss or damage (after deduction of all discounts and trade allowances for cash payments) are alone recognized in estimating sound values in respect of claims for stock-in-trade.

Estimates should be submitted to the Insurer before instructions are given for the work to be put in hand and if possible should accompany this form.

APPENDIX B

(*Specimen Adjuster's Report*)

BLACK & WHITE
Adjusters

100 Green Street,
Redtown,
Pinkshire
1st October, 19....

The Manager,
The Indigo Assurance Co. Ltd.

Fire Loss
Blue & Co. Ltd., Grey Street, Brownham and the Southshire Bank Ltd., as Mortgagees

With reference to our previous reports, we have now completed our adjustment of this loss and settlement has been reached at a figure of £25,392.

Circumstances and cause of loss

The claim is the outcome of a serious fire which occurred at the insured's single storey clothing factory in Grey Street on Monday, 9th January, 19... The fire was first seen at about 11 p.m. by a passer-by, who noticed the glare of flames through a window. He immediately ran to the nearest public telephone call box and summoned the fire brigade, which quickly responded and were on the scene within ten minutes. By this time, however, the fire had gained a firm hold, and, in spite of the quick turn-out, it was several hours before it was finally extinguished. By reason of the severity of the fire, which seems to have originated in the finishing section, it has not been possible to establish the cause. Smoking is prohibited and all electric power was cut off when the premises were closed after working hours. In spite of very exhaustive inquiries no definite evidence can be obtained of the possible cause, which must be officially recorded as unknown. We are completely convinced, however, that so far as the insured are concerned, the fire was accidental in origin.

Description of Damage

As the result of the fire, the building and its contents were seriously affected. The roof of the building was partially destroyed and severe damage caused to other parts including lighting and heating installations. Almost the whole of the plant and other equipment was affected, part being virtually destroyed or rendered useless, while the bulk of stock-in-trade, by its nature, was very badly damaged or destroyed.

Details of Claim and Adjustment

Particulars of claim were received as follows—

	£
Building (insured by item 1)	9,437
Machinery, etc. (insured by item 2)	5,346
Stock-in-trade (insured by item 3)	12,637
	27,420

Item 1. *Buildings*—

Sum insured £20,000. In spite of the severity of the fire, close examination of the walls showed that they were still sound and fully capable of being incorporated into the reinstatement. The damage to the roof, however, was such that almost the entire

roof had to be replaced and this was the major part of the claim. We checked carefully the builders' specification, which was substantially correct in scope, quantity, and costing, but we deleted that part of the cost which related to overtime working, because this was carried out in order to permit the resumption of trading at the earliest possible date. We therefore transferred the amount involved to the loss of profits claim. We discussed the claim at length with the insured's architects, and agreed the total cost of reinstatement at £8,936. The insured maintain their premises in a first-class condition and were reluctant to agree that any deduction was warranted for depreciation. We pointed out, however, that, *inter alia*, some redecorating was due to be carried out, and it was also established that certain repairs would have had to be made to the roof if the fire had not occurred. After a friendly discussion our views were accepted and the figure finally agreed at £8,400.

Architects' fees, amounting to £130, were also claimed, and as these are well within the scale authorized by the Royal Institute of British Architects, and have been solely incurred in the superintendence of reinstatement, we have allowed them in full. The building item was, of course, extended to include such fees. The final figure for the building loss, including architects' fees, is therefore £8,530.

Item 2. *Machinery and Plant, etc.*—

Sum insured £10,000. Owing to the prompt and efficient attention given to the machinery, the amount claimed has come out considerably less than was at first thought. We were fortunate to obtain the willing co-operation of the makers who, as soon as it was possible, examined closely all the affected machines and at once removed those capable of repair. Some, however, were beyond economic repair and had only a nominal scrap value. We duly received full details of the total cost of repairs and replacements to all property covered by this item and found that no deduction had been made for wear and tear. So far as the repaired machines are concerned, no deduction was warranted, because the life of the machines has not been prolonged in any way and the repairs do not constitute any improvement.

The two replacement machines are new and although those they replaced are only eighteen months old, the insured agreed that some deduction for wear and tear must be made. The claim in respect of the other property coming within the scope of this item was reasonably stated, and after making various adjustments, including deductions, where necessary, for depreciation, the claim under this item was agreed at £4,969.

Item 3. *Stock-in-trade*—

Sum insured £25,000. The nature of the stock was such that even minor damage has taken away most of its value. Much was rendered useless, and it was unfortunate that a large quantity of finished goods was stacked, awaiting collection on the day following the fire. The insured keep daily stock records, and with the aid of invoices and receipts (full allowance having been made for trade and cash discounts) we had no difficulty in establishing the quantity and value of stock on the premises at the time of the fire. The claim, as submitted, called for only minor adjustments and was finally settled at £11,893, after making allowance for the small amount of stock which had some little salvage value and which the insured agreed to keep.

In the figure of £12,637 submitted your insured had included an amount of £263 in respect of goods in trust belonging to three of their customers who had approached the insured requesting payment for their losses. We pointed out that the policy contained no item on goods in trust, which were therefore excluded by the policy conditions. Further investigation, however, showed that this was intentional as, by the terms of their contracts with their customers, the insured had specifically contracted out of all liability for loss or damage, however caused, to goods in trust. The insured were therefore asked to tell these customers to claim from their own insurers and this item was deleted from the original amount claimed.

Average

The sum insured by each item is subject to the *pro rata* condition of average, but we can confirm that all sums insured were adequate at the time of the fire so that average is inoperative. Stock-in-trade is insured on a declaration basis, the last declaration before the fire being £19,756.

Warranties

As far as we can ascertain, all warranties were being fully observed at the time of the fire.

Settlement

The final settlement is therefore £25,392 made up as follows—

			£
Item	1.	Building	8,530
,,	2.	Machinery, etc.	4,969
,,	3.	Stock-in-trade	11,893
			25,392

and an acceptance form for this amount is enclosed. As the building has now been completely reinstated, The Southshire Bank Ltd. (who are interested in the building insurance only) are willing for their name to be omitted from the cheque in settlement and a letter to this effect is enclosed. Your cheque, when drawn, should therefore be made payable to the order of the Blue & Co. Ltd. only.

FEE AND EXPENSES £750.

Yours faithfully,

INDEX